Supreme Court, U.S.
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No.

In The
Supreme Court of the United States

John Green
Petitioner

v.

America Online Inc.(AOL)
John Does 1 & 2
Respondent

On Petition For Writ Of Certiorari To The Third Circuit Court Of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does 47 U.S.C. Sec 230 et seq., immune a ISP from any liability if a ISP knows their system is being used by a member to commit criminal acts against another member and cause physical damage to the other persons computer?

2. Is 47 U.S.C. Sec 230 vague, overbroad, and not narrowly tailored to promote a compelling state interest and allows government to abridge the freedom of speech?

3. The New Jersey Supreme Court in New Jersey v Schmid 423 A.2d 615(N.J. 1980) held that under New Jersey constitution a private party may be required to honor First Amendment rights if its property is sufficiently devoted to public uses. The petitioner case in the district court was dismissed before discovery. In a facts intense issue should a case be dismissed without discovery?

4. If an internet provider?s software modifies your computer so that they are the only provider you can use, do they now have the right to limit your freedom of speech on the internet?

5. Did the Third Circuit appellate court excess its authority by not following case law from New Jersey?s highest court on the Plaintiffs state actions?

6. If New Jersey Consumer Fraud Act, N. J. S. A. 56:8-1, et seq., provides that deception and fraud in commercial practice are declared to be unlawful, and it is alleged and shown that the respondent, AOL, knowingly deceived the Petitioner with fault advertisements, would 47 U.S.C. ? 230(c)(2) provide AOL with immunity from N. J. S. A. ? 56:8-1, et seq.?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is published as Green v. America Online (AOL) John Does 1 & 2 318 F.3d 465 (3rd Cir 2003) The opinion of the United States District Court for the District of New Jersey is unpublished as John Green v. America Online (AOL) and John Does 1 & 2 Docket 00-3367(JAG) (App 6A).

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit (Court of Appeals) was entered on January 16, 2003. The Court of Appeals denied a timely petition for rehearing on February 12, 2003 (App 1A).
The jurisdiction of the Court is invoked under 28 U.S.C. Sec 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in relevant part:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press;

47 U.S.C. Sec 230

(2) CIVIL LIABILITY- No provider or user of an interactive computer service shall be held liable on account of?

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy,

excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).

STATEMENT OF THE CASE

Proceeding in State Court

AOL members use names other than their real name While on AOL Green uses the pseudonym of, "Lawyerkill". One of the John Does used the pseudonym, "LegendaryPOLICA".

Green alleged that while he was in a chat room on AOL 'LegendaryPOLCIA ', John Doe1, entered the room as LegendaryPOLCIA and started sending a ?punter? to Green's Computer to cause it to lock up. A punter is a hackers program used to knock people off line and cause damage to their computer.

Green alleged that this resulted $400.00 damage to Green's work on his computer. LegendaryPOLCIA continued to lock up Greens computer on March 22, 23 and 24. Green alleged that he informed AOL that this was happening and AOL took no effective action to stop it.

On March 22 and 23 Legendary defamed Green. AOL was faxed a copies of the log of the chat room with LegendaryPOLCIA defaming Green and AOL did nothing. On March 22, 2000, someone copied Green's screen name and assumed his identity through a fault in the AOL software used the screen name Lawyerkiii (John Does 2), which appeared on AOL as "Lawyerkill". 'Lawyerkiii" began impersonating Green, asking the male members of the group for gay sex, "Lawyerkiii" started sending, ?Instant messages? to the males in the Group asking for gay sex. Green was mocked and treated

with scorn by the group because of the actions by Lawyerkiii . Green tried to explain it wasn't him, but was not believed. Lawyerkiii repeated his actions on March 23 and 25. AOL was informed of what was happening to Green by phone calls and faxes on March 22-23, 2000. AOL would take no action to stop the damage .

The plaintiff, Green, filed in New Jersey Superior Court alleging that while on AOL another member of AOL defamed him and caused damage to his computer. Green alleged that AOL breached its agreement with Green because after being informed of what was happening they did nothing to prevent future harm to Green.

On, May 25, 2000 AOL filed a motion in Superior Court to dismiss. On or about, July 11, 2000 Plaintiff filed an amended complaint and a letter brief in opposition to AOL's Motion to Dismiss. In the amended complaint Green alleges AOL waived its right to use, 47 U.S.C. Sec 230 and in his brief he argued that 47 U.S.C. Sec 230 is unconstitutional. Green alleged that AOL allowed John Does 1 or 2 to commit a criminal act against Green. Green alleged that AOL breached the covenant of good faith and fair dealing. Green also alleges that AOL violated his Freedom of speech right under the New Jersey Constitution and violated Consumer fraud laws of New Jersey by promising him 'Unlimited Internet (App 55A)' Access while knowing that they blocked parts of the Internet from him.

On or about, July 12, 2000 AOL filed a Notice of Removal with the United States District Court, Newark NJ.

Proceedings in the District Court

The issues presented herein were thoroughly presented to the Federal District Court. On,

Motion to Remand

August 10, 2000, Green filed a Motion to Remand. Based on the allegation that not all parties were served, the claim raises a novel or complex issue of State law, the claim substantially predominates over the claim or claims over which the district court has original jurisdiction.

On, Sept. 12, 2000 Honorable Judge Haneke recommended that this case not be remanded back to state court On, Oct. 24, 2000 Honorable Judge Greenway Denied Green's Motion to Remand.

Motion to Dismiss

On, Aug. 3, 2000, AOL filed a Motion to Dismiss.

The defendant, AOL, argued that there have been many court cases involving 47 U.S.C.SEC.230 and they all been resolved in favor of immunity for the ISP and that although Green disputes that the, 'punter' constitutes, 'information' the dictionary list, 'information' as a signal and a, 'punter' is a signal. So a, 'punter' is, 'information' in the meaning used in 47 U.S.C. Sec 230.

The Defendant AOL argued that 47 U.S.C. Sec 230 is not unconstitutional and Green's argument is frivolous because no other plaintiff has ever made that argument and in all the cases involved with Section 230 there has never been a hint that there was a First Amendment problem. AOL argued that there was no breach of any portion of its contract with
Green because one of the provisions of the contract says it confesses no rights on to the members. AOL argued that since they are not a, 'state actor' they can not violate Green's federal First Amendment rights, and since AOL's property is not, "devoted to public use" they have not

violated Green's rights under the New Jersey Constitution, and even if they did violate Green's rights under the New Jersey Constitution, federal law would override that state law. Finally AOL argues that they did not commit consumer fraud by advertising, "Unlimited Internet" than blocking parts of the Internet from Green because Section 230 (c) (2) immunes them from suit for doing that.

On, Sept 11, 2000 Green filed a brief in opposition to AOL's motion to Dismiss. Green alleged and it was undisputed, that the contract that defendant, AOL supplied to the court was not the contract that Green first agreed to, that AOL modifies your computer when you first install is was that AOL is the only ISP that you can use. Green argued that in the membership agreement with AOL, AOL promised to protect Green from the very offences that Green alleges were committed against him by John Doe 1 & 2, AOL members. Green argued that this was the only consideration in the contract to bind the parties. Green argued, that AOL blocks parts of the Internet from its members. Green argued that AOL waived any rights they would have had under 47 U.S.C. Sec 230 by way of this membership agreement and even if they didn't 47 U.S.C. Sec 230 was not meant to immune a ISP from criminal acts by their members, when the ISP was made aware of these acts and did nothing to stop them. Green argued that that AOL invited the General public to use their system at no charge and that under New Jersey v Schmid 423 A.2d 615(N.J. 1980) they had to afford Green the right of Freedom of Speech under the New Jersey Constitution.

District Court's Opinion

The District court dismissed Green's Tort claims against AOL holding that they were immune from liability, pursuant to 47 U.S.C. Sec 230 (AXXX). The Court also found that AOL did not waive its right under 47 U.S.C. Sec 230 with the membership agreement and that the word,

'information' should be given a very broad meaning under 47 U.S.C. Sec 230 (App 11A). The District court dismissed Green's allegation that 47 U.S.C. Sec 230 was unconstitutional because rather then hindering free speech it was enacted to promote it (App 12A). The court dismissed Green's allegation that AOL breach its contract with Green because it felt that Green did not identify a specific provision that it breached and that the Community Guidelines were intended just to warn subscribers of what they may encounter on AOL (App13A). The Court dismissed Green's allegation that AOL violated his First Amendment rights because AOL was not devoted to public use. And finally the Court dismissed Green's allegation of consumer fraud under New Jersey Consumer Fraud Act (NJCFA) 56:8-2 because the court held that AOL did not act unconscionable because it was just operating to protect its members from unsolicited bulk e-mail, and that 47 U.S.C. Sec 230(c) (2) provides immunity for this action (App 15A) .

The District Court did not rule on Green's claim of breach of the covenant of Good Faith and Fair Dealing.

The Court of Appeals

The issues presented herein were thoroughly presented to the Third Circuit Court.

Green alleged and it was undisputed that the contract that defendant, AOL supplied to the court was not the contract that Green first agreed to, that AOL modifies your computer when you first install is was that AOL is the only ISP that you can use.

Green alleged that the when district court Green found there was an Agreement between AOL and Green, and resolved any doubt of the meaning of the words in favor of AOL. That District Court also did address Green's claim of breach

of the covenant of Good Faith and Fair dealing, and clear case law from the highest court in New Jersey saying this is an issue for a jury to decide, not a Judge. And that the bargaining powers of the parties was an issue under New Jersey case law and the court should consider that.

Green argues again that 47 U.S.C. Sec 230 itself is unconstitutional because it allows government to restrict protected speech. Green agues that the District Court erred in dismissing Green's claim of Freedom of speech, under the New Jersey Constitution, by finding that AOL did not allow the general public in for free, and not giving any weight to the evidence that Green presented to show they did (App 14A). Green argues that the District Court misapplied the case law in New Jersey on Consumer fraud, that Green's case was not just about blocking emails, but parts of the Internet from Green, when AOL advertised, ? Unlimited Internet? to get Green to accept their offer.

Green alleged that the district court was in error for give the word 'information' in 47 U.S.C.SEC.230. too broad a meaning and that if congress wanted the terms, 'information' to have anything other then the common use as most of us understand it, they would have define the word in a technical sense.

Green argued that by not remanding the total case back to State Court, the District Court has stepped on the sovereignty of the State of New Jersey by dismissing the State claims of freedom of speech and not remanding the case and letting the State of New Jersey decide those issues.

Appellate Court Opinion

The appellate Court held that Green tort claims were subject to AOL's immunity under 47 U.S.C. Sec 230, Green v America

Online (AOL) John Does 1 & 2 318 F.3d 465 at 470 [4](3rd Cir 2003). On Green's allegation that a, 'punter' was not, 'information' in the meaning of 47 U.S.C. Sec 230 the court held that the congress meant that the word, 'information' should have a broader meaning, that includes any signal, Id at 471[6](There is a footnote (3) on page 471 saying Green does not dispute that John Doe 1 & 2 are information providers, Green did dispute this, Green disputed that a, ? punter? is information). The Court held that AOL did not breach the membership agreement because it has a provision in it where AOL say it did not assume any responsibility for content provide by a third party, Id at 471[6]. The Court also held that the contract has consideration, and that consideration was Green's membership and use of service, Id at 471-472[7]. The Court held that Section 230 was not unconstitutional because it did not require AOL to restrict speech, Id at 472[8]. The Court held that the membership agreement was not intended to confess any rights to Green and that the claim of breached covenant of good faith and fair dealing fails because of the explicit wording of the agreement, Id at 472 [9]. The Court held that Green's allegation of violation of the right of free speech under the New Jersey Constitution failed because AOL's service was not sufficiently devoted to public use, Id at 472 [10]. And finally on Green's allegation of consumer fraud under New Jersey Consumer Fraud Act the court held that AOL did not act unconscionable because it was just operating to protect it's members from unsolicited bulk e-mail, and that 47 U.S.C. ? 230(c) (2) provides immunity for this action.

I. THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE APPELLATE CONSTRUCTED 47 U.S.C. SEC 230 TOO BROADLY.

Congress passed 47 U.S.C. Sec 230 to immune a interactive computer service from liability from acting as a publisher or

speaker of any information provided by another information content provider.

The district court held that Congress intended the word, 'information' to have the broadest interpretation to include a signal sent out with the sole purpose of doing damage to someone else's property (App 11A), the appellate court affirmed the district courts broad definition of the word Green v America Online at 471.

While it is true that one of the definitions of the word, 'information' is a, 'signal', that is a technical usage, and not a normally understood usage. The dictionary list the definitions in the order of the most common understanding of the word, information defined as a signal is the last one, and least likely usage of the word.

Many of the acts John Doe 1 & 2 alleged to have committed would be criminal acts, N.J.S.A. 2C:33-4(c) Harassment, N.J.S.A. 2C:17-3(1) Criminal mischief, N.J.S.A. 2C:21-17 wrongful impersonation.

When we immune business from a liability, when we take away a plaintiffs right for redress, than we should narrowly define the words in a statue. Congress clearly never intended to immune service provides who allow their system to be used in the commission of a crime. If they know that their system is being used to damage someone's property and they chose to let it continue than they should be held liable like any other business would for gross negligent. 47 U.S.C. Sec 230 was meant to deal with speech, and not damaging signals sent over computer networks.

> "Congress made a policy choice, however, not to deter harmful online speech through the separate route of imposing tort liability on companies that serve as intermediaries for other par- ties' potentially

injurious messages.' Zeran v America Online 129 F.3d 327 (4th Cir. 1997)

II. THIS COURT SHOULD GRANT CERTIORARI BECAUSE ON IT FACE 47 U.S.C. SEC 230 IS IN CONFLICT WITH THE FIRST AMENDMENT

The Appellate court held that Green's argument that 47 U.S.C. Sec 230 lacked merit because it does not compel AOL to restrict speech Green v America Online at 472[8]. Green argument was it allows the state to restrict protected speech.

Statue 47 U.S.C. Sec 230 (c)(2)(a) allows a "interactive computer service" to restrict material it deems objectionable, whether or not such material is constitutionally protected. The problem is the way it defines "interactive computer service".

47 U.S.C. Sec 230(f)(2) The term "interactive computer service" means any information service, system, or access software provider.

So this not only covers commercial ISP's but also Local, State and federal government. "Some of the computers and computer networks that make up the Internet are owned by governmental and public institutions" ACLU v Reno 929 F. Supp. 824 [E.D. Pa. 1996]. So it allows the government to abridge the freedom of speech, The First amendments says, Congress shall make no law abridging the freedom of speech. The Honorable Judge Hugo Black found, "No law" means "no law", SUPERIOR FILMS v. DEPT. OF EDUCATION, 346 U.S. 587 (1954). The law is void for vagueness, overbroad, and not narrowly tailored to promote a compelling state interest. The public can only benefit from the free flow of protected speech, 47 U.S.C. ? 230 puts that flow of protected speech into the hand of a very few and at cross proposes with the

First Amendment.

In a case based on a 47 U.S.C. Sec 230 issue, Mainsteam Loudoun v Bd. Of Trustee of Loudoun 24 F. Supp 2d 552 at 570(E. D. Va. 1998), that court held that Loudoun library was restricted by the First Amendment in the limitations it is allowed to place on patron access, and such a policy like Loudoun had offends the guarantee of free speech in the First Amendment and is, therefore, unconstitutional, .

Now one may argue that 47 U.S.C. Sec 230(c)(2) does not prevent a plaintiff from going to court and getting injunctive relief (As Green has asked for in his complaint) to prevent each provider from censor what he sees and says, but that's an affirmative obligation which the Supreme Court felt the Government may not impose on someone, see LAMONT v. POSTMASTER GENERAL, 381 U.S. 301 at 301 (1965). [T]he First Amendment protects against government inhibition as well as prohibition Fabulous Assocs., Inc. v. Pennsylvania Pub. Util. Comm. 896 F.2d 780 at 785-86 (3rd Cir. 1990).

IV. THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE ISSUE OF NEW JERSEY'S RIGHT TO FREEDOM OF SPEECH UNDER ITS CONSTITUTION SHOULD NOT BE DISMISSED WITH ANY DISCOVERY.

The New Jersey Supreme Court in New Jersey v Schmid 423 A.2d 615(N.J. 1980) held that under New Jersey constitution a private party may be required to honor First Amendment rights if its property is sufficiently devoted to public uses. The determination is whether, taken together, the normal uses of the property, the extent of the public's invitation, and the purpose of free speech in relation to the property's use result in a suitability for free speech on the property that on balance, is sufficiently compelling to warrant limiting the private property owner's right to

exclude it; a suitability so compelling as to be constitutionally required.

The appellate court found that Green's argument under the New Jersey constitution fails because AOL's service is not sufficiently devoted to public use under the factors of New Jersey v Schmid.

Now this was a motion to dismiss under Fed R. Civ. P. 12 (b)(6), the standard is a lot lower then for summary judgment. And for the Third Circuit the standard is,

A complaint should be dismissed only if, after accepting as true all of the facts alleged in the complaint, and drawing all reasonable inferences in the plaintiff 's favor, no relief could be granted under any set of facts consistent with the allegations of the complaint. ALA, Inc. v. CCAIR, Inc., 29 F.3d 855, 859 (3d Cir. 1994).

Now Green believes that many of his allegation may meet the standard to survive a motion for summary judgment, but in the least they should survive the standard of a motion for dismissal.

Green supplied evidence to the district court, from AOL own documents, that the general non-paying public was invited in to use AOL property at no charge (App 54A). Unfortunately since there was no discovery as of yet, and much of the information on the extent of use by the public was in the hands of AOL on this matter, and was unavailable to Green, the case was dismissed and Green never had the opportunely to get that information from AOL. However after Green's case was dismissed and during the appeal process AOL posted information on their website on how many of the general non paying public is invited use AOL at no cost (APPENDIX). Green did a

motion to supplement the record, with this newly available evidence, but the appellate court denied it. (App 4A) . In a footnote in his brief to the appellate court Green did refer to that new information saying that AOL has about 22 million members. But over 100 million people using their system for free. It becomes rather difficult for a Plaintiff to support his allegation when there is no discovery in a case, and when he does get new evidence he is denied the opportunely to present it.

IV. THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE ISSUE OF FREEDOM OF SPEECH ON THE INTERNET IS OF GREAT PUBLIC IMPORTANCE.

There are two distinct parts to AOL, a proprietary based part that's totally under the control of AOL, with chat rooms, message boards, current events, and a part that is just a portal to the Internet. And there are two parts of the petitioner's freedom of speech action, the Freedom of speech under the First Amendment of the United States Constitution, and Freedom of speech under the New Jersey Constitution. It section will address Freedom of speech on the internet under the First Amendment.

In ACLU v Reno 929 F. Supp. 824 [E.D. Pa. 1996] the court held,

> Students, faculty, researchers, and others affiliated with the vast majority of colleges and universities in the United States can access the Internet through their educational institutions.

In Reno v ACLU 521 U.S. 844(1997) this court said about Internet .

> "This dynamic, multifaceted category of communi cation includes not only traditional print

> and news services, but also audio, video, and still images, as well as interactive, real time dialogue. Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer."

And called it a, "vast democratic for a". America Online as a Plaintiff in Reno v ACLU so they are taking a new position now it would appear.

AOL modifies your computer so they are the only service you can use on that computer, so they are the only way for you to get to the internet and they are in the same position as running a company town. They have a cyberspace company town going, they are the police, the mailman, the law maker, and you can't move. So if they want to be the company town than they should be treated the same way as Marsh v. Alabama, 326 U.S. 501 (1946)

They not only want to control what we see and say on their proprietary system, but on the Internet as well. These sites on the Internet are not their property, so what would give them the right to control me while I'm on a tax supported, Local, State or Federal government site? My taxes also helps built the Internet. Each person that has a home phone also pays a "Universal Access Charge." required under 45 USC 254 et seq. to contribute monies to a fund that is used to supplement low income consumers, schools and libraries the cost of access to information systems such as the internet.

V. THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE APPELLATE COURT DID NOT FOLLOW NEW JERSEY CASE LAW FROM NEW JERSEY'S HIGHEST COURT.

Good Faith and Fair Dealing.

The appellate court held that Green's claim that AOL breached the implied covenant of good faith and fair dealing failed in light of an explicit term of the Membership Agreement forecloses that it did not confer any rights to Green and AOL did not promise to protect Green from acts of other members. This goes against the New Jersey Supreme Court Case law that Green cited to the District and Appellate Court.

In, WILSON V. AMERADA HESS CORP. 168 N.J. 236, at 244 773 A.2d 1121 (S. Ct. 2001) the court held;

> "Although the implied covenant of good faith and fair dealing cannot override an express term in a contract, a party's performance under a contract may breach that implied covenant even though that performance does not violate an express term."

The Respondent, AOL, argued in the appellate court that whether to enforce the provision on of the Membership agreement is a discretionary choice of AOL. That very choice goes to the heart of the covenant of Good Faith and Fair dealing:

> "But the discretion afforded under the contract is not unbridled. Performance under the contract is tempered by the implied covenant of good faith and fair dealing and the reasonable expectations of the parties. " Id at 250.
>
> "Here, to give full effect to the express term, we state the test for determining whether the implied covenant of good faith and fair dealing has been breached as follows: a party exercising its right to use discretion in setting price under a contract

> breaches the duty of good faith and fair dealing if that party exercises its discretionary authority arbitrarily, unreasonably, or capriciously, with the objective of preventing the other party from receiving its reasonably expected fruits under the contract. Such risks clearly would be beyond the expectations of the parties at the formation of a contract when parties reasonably intend their business relationship to be mutually beneficial. They do not reasonably intend that one party would use the powers be stowed on it to destroy unilaterally the other's expectations without legitimate purpose." Id at 251.

And like the plaintiff in the above case Green was also denied opportunity to produce circumstantial evidence of bad faith, the court held that they were entitled to additional discovery and remanded the case back to the lower court. This was to allow the plaintiff to establish a jury question on their claim for breach of the implied covenant of good faith and fair dealing.

And the question of whether there was a breach the implied covenant of good faith and fair dealing is a question for a jury.

> "Borden's course of conduct with each should have been presented to the jury to enable it to determine whether Borden breached the implied covenant of good faith while performing its obligations. The trial court agreed and permitted the case to go to the jury on that basis." SONS OF THUNDER V. BORDEN, INC. 148 N.J. 396, at 399 690 A.2d 575 (S. Ct. 1997)

The appellate court erred on New Jersey case law in the fact the express terms of a contract and the covenant of good faith and fail dealing are separate issues, and if there was

a breach of the covenant is a question of fact for a jury.

Bargaining Power

Another issue Green raised was the bargaining power of the parties.

Green has read the membership agreement that AOL supply to the appellate court, however it's undisputed that this was not the same agreement that Green and AOL had when Green first joined AOL.

AOL unilaterally would modify the membership agreement over the years. The appellate court failed to take into account the overwhelming lack of bargain power that Green had. It's undisputed that the AOL software that you install modifies your computer so that you can not use another service provider; you have to use AOL now. Over the years as AOL is changing the membership agreement to their advantage, you are increasing losing any bargaining power you had. You develop contact on AOL and the Internet, friends, business contacts, websites, newsletters and newsgroups, all depend on your email address. At the time this action was filed there was no means to follow email if you were able to change providers. So you would have to sit down and notify all the people that have your old AOL email address to one of a new provider, which could number in the hundreds. Your address book of all your contact also can not be transferred, so you have to redo that. Another example is bookmarks; these are the stored addresses of websites that you use, after they are stored all you have to do it click on their name and you are automatically connected to that website, no need to enter in the address every time you seek to go to that website. There is no way to transfer this to a new provider you now would have copy down all the addresses and reenter them in the new provider system, again this could be in the hundreds.

That was just a few examples of the hours, if not days of work ahead of you if you transfer provider, and again that's without addressing the issue of AOL changing you computer so that you can't transfer providers.

The New Jersey Supreme court considered bargaining power a major component when entering and staying with a contract. In *INSTRUCTIONAL SYS. V. COMPUTER CURRICULUM CORP.* 130 N.J. 324 at 339, 614 A.2d 124 (S. Ct. 1992) the court held;

> "Where there is grossly disproportionate bargaining power, the principle of freedom to contract is non-existent and unilateral terms result. In such a situation courts will not hesitate to declare void as against public policy grossly unfair contractual pro visions which clearly tend to the injury of the public in some way. "

And in, RUDBART V. NORTH JERSEY DIST. WATER SUPPLY COMMN. 127 N.J. 344 at 355, 605 A.2d 681 (S. Ct. 1992) the court held;

> "Because the parties' "grossly disproportionate bar gaining power" had produced a "grossly unfair" term that contravened "the extant public policy of this State, we did not enforce that term."

Conflicting Provisions in a contract

The appellate court affirmed that districts court ruling that there was a clause in the membership agreement when AOL said it was not responsible for any third party actions and the agreement confesses no rights to the member. However there are conflicting provisions in the agreement and the New Jersey Supreme Court held when that happens than it?s a question for a jury.

In, MICHAELS Vs. BROOKCHESTER, INC. 140 A.2d 199, 26 N.J. 379 at 387-388 (NJ S. Ct. 1958) the court held;

> "Ordinarily the construction of a written agreement is a matter for the court, but where its meaning is uncertain or ambiguous and depends upon parol evidence admitted in aid of interpretation, the meaning of the doubtful provisions should be left to the jury. Newark Publishers' Ass'n. v. Newark Ty pographical Union, 22 N.J. 419, 427 (1956); {*388} Spinelli v. Golda, 6 N.J. 68, 79 (1950); Jennings v. Pinto, 5 N.J. 562, 570 (1950); 3 Williston, Contracts (rev. ed. 1936), □ 616, p. 1772. Where ambiguity exists, the subsequent conduct of the parties in the performance of the agreement may serve to reveal their original understanding. Journeymen Barbers, etc., Local 687 v. Pollino, 22 N.J. 389, 395 (1956). The trial judge correctly found the lease to be ambiguous with respect to the landlord's obligation and hence admitted evidence of the parties' practical construction of ts terms. In those circumstances, it was proper to sub mit the issue of the meaning of the contract to the jury as one of fact.
>
> The lease contains no clear cut promise by the tenant or landlord with respect to the repair of the defect here involved. Rather there are expressions pointing both ways. In analyzing the agreement, we should be mindful of the rule that ambiguities are to be taken most strongly against the draftsman, here the defendant. Terminal Construction Corp. v. Bergen County Hackensack River Sanitary Sewer District Authority, 18 N.J. 294, 302 (1955); Moses v. Edward H. Ellis, Inc., 4 N.J. 315, 322 (1950)."

There are conflicting clauses in the agreement as to make it ambiguous. At best the membership agreement is

inconsistent. And if it's inconsistent, then it's ambiguous, see Fashion House Inc., v K Mart 892 F.2d 1076 (1st cir. 1989) at 1083. If it is ambiguous then it's a matter for a jury to decide. In one section of the contract it makes promises to the members, in another section it disclaims those promises.

Green maintained that AOL promised, in the membership agreement, that they would maintain a protective environment and make an effort to shield its members from the very thing that Green suffered from under the hands of John Doe 1 & 2. And that if they had any immunity by way of 47 U.S.C. ? 230, they waived that immunity with the promises of in the membership agreement. The District and Appellate court held that AOL, in the membership agreement, disclaimed any liability for the actions of a third party.

Green believes the wording in their Community Guidelines clearly tells Green that AOL is protective of its members (community) what he can expect from AOL and what is expected of him, a mutual promise. In, TROY V. RUTGERS 168 N.J. 354 at 365, 774 A.2d 476 (S. Ct. 2001) the court said

> "Implied contract terms generally are considered as binding as express contract terms. See Wanaque Borough Sewerage Auth., supra, 144 N.J. at 574 ("Contracts implied in fact are no different than express contracts."); Restatement (Second) of Contracts 19 cmt. a (1981) ("There is no distinction in the effect of the promise whether it is expressed in writing, or orally, or in acts, or partly in one of these ways and partly in others."). ("There is no distinction in the effect of the promise whether it is expressed in writing, or orally, or in acts, or partly in one of these ways and partly in others."). But see Jackson v. Georgia-Pacific Corp., 296 N.J. Super. 1, 15, 685 A.2d 1329 (App. Div. 1996)

Whether the parties acted in a manner sufficient to create implied contractual terms is a question of fact generally precluding summary judgment. Id at 366.

Both the District and the Appellate court were supplied with quotes from the Steve Case, the CEO, about the protection an ISP should offer.

On, March 5 1998, Steve Case the CEO of AOL says,

> "They tell us in no uncertain terms that they expect their children to be safe on line. The bottom line is that these demands are reasonable. In fact, if inter net online services can't live up to those expectations, we don't deserve to be a mass market medium."

One of the defenses of AOL gives for blocking parts of the Internet and email, is to protect its members. The District court accepted this (App 15A) and so did the Appellate Court Green v. America Online (AOL) John Does 1 & 2 at 472[11-13].

As far as the acts of a third party,

> 17 Am Jur 2d Sec 686 Acts or conduct of third person says, "where a promise is conditioned upon the act or consent of a third person, the condition must be performed."

AOL had control of this third party; it controlled his access to its service. Even if a jury finds that AOL didn't promise to protect Green Online content, AOL still breached the contract. This disclaimer AOL has deals with content, and AOL defines the meaning of the word. Nowhere in this disclaimer does it state that AOL is not responsible for removing a member committed illegal acts.

If we look at the beginning of the community guidelines in the very first sentence AOL that they are, 'protective' of their community (App 31A). Now in my brief to the district court I showed where, 'community' means each member of AOL, the defendant never disputed this understanding. When we read down a few lines the defendant tells us that, the Community Guidelines tell you what you can expect from AOL, as well as the kind of online behavior we expect of you (App 31A). There is a mutual assertion, there is a mutual promise. And it goes on to outline the prohibited behavior not allowed on AOL under threat of termination. Now notice in clear language they tell you, Community Guidelines tell you what you can expect from AOL and they write of, behavior.

It there any reason for Green to believe that AOL intended to enforce these rules against other member that was harming Green, yes. If we read what is under, 'Illegal behavior', second paragraph it asks of the help Green maintaining the community standards. If we go, "How to Notify AOL of Problems Online" (App 40A) the first sentence talks of reporting violations of the community guidelines that a member has been subject too. If as AOL alleges, they conferred no rights to Green, than how could someone violate a right Green didn't have? If the parties did not contemplate enforcing violations of one member against other why would they ask that a violation be reported? And if Green has rights, where did they come from, certainly not 47 U.S.C. Sec. 230, this does not require AOL to give Green any rights in the community guidelines. That's where Green's rights are, in the Community Guidelines. AOL choose to give these right in the contract with Green under the mutual promise by Green would not to violate the community guidelines (rights) of another member. The defendant AOL alleges that they never promised to protect Green from anything. So not only does the membership agreement say in writing that they will be protective of the members, but they admit by their actions that was they intent.

Under the heading, "Getting help: Online resources""Neighborhood Watch" It talks about reporting violations and online conduct (App). If Green was not a third-party beneficiary, than what type of violation are they talking about? If John Doe was just committing a violation against AOL why would they ask Green to report it, why report it if they didn't also mean the violation was against Green? Under the heading of, "AOL'S PRIVACY COMMITMENT" the first sentence starts out saying, "We are committed to protecting your personal privacy."

Green alleges that illegal acts were committed against him by John Doe 1 & 2. Right in the membership agreement AOL says that they have zero tolerance for Illegal behavior, Green took them at their word for this, yet they allowed these acts to be committed against Green and they had the power to stop it at any time.

So here is what we have, we have AOL telling Green that they 'protective' of their community (Members), than they tell Green what he can expect from AOL, and list the type of conduct that he should expect that is not tolerated on AOL (it says what he should expect and what is expected of him, so he is expected to comply, and should expect other member to do the same, as per AOL). He is then asked to help AOL enforce this by reporting any violations that he has been a subject of to AOL. He is then told, in clear, unambiguous words, "We are committed to protecting your personal privacy." We have all this and we have AOL
saying the contract says that they never promised to enforce the Guidelines. And they point to the clause that says that the membership agreement is not intended to confer and does not confer any rights or remedies (This may have not even appeared in the first contract, since this is not the contract that Green first agreed too). Telling Green that they are committed to protect him in one sentence and then telling Green they are not committed to protect him in another sentence, is inconsistent on its face.

Seeing a fatal defect in their argument, lack of consideration, AOL finally claims that the consideration afforded Green under this contract was the use of AOL service. Green pointed out in the contract it says, "AND DOES NOT GUARANTEE THAT MEMBERS WILL BE ABLE TO ACCESS OR USE THE SERVICE AT TIMES OR LOCATIONS OF THEIR CHOOSING, OR THAT AOL WILL HAVE ADEQUATE CAPACITY FOR SERVICE AS A WHOLE OR IN ANY SPECIFIC GEOGRAPHIC AREA." (App 26A) And in fact that AOL oversold their service and prevented subscribers from accessing the service in 1996, see Howard v America Online Inc 208 F. 3d 741 at 750(D)[21] (9th Cir. 2000). In Green Amended Complain filed June 12th 2000 he alleges that he was a member of AOL for 4-5 years so that would put Green in the time period when subscribers could not access AOL. In Discovery we can learn how AOL used that provision in their dealings with Green when and if he was unable to access AOL. We can also in Discovery if they ever use the Community Guidelines to protect Green or cancel his AOL service of alleged violations of the Community Guidelines. Than a jury can use that to decide the intent of the parties in this matter.

IV. THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE ISSUE OF SECTION 230 SHOULD NOT SHIELD A COMPANY FROM CONSUMER FRAUD.

There is no dispute that 47 U.S.C. Sec 230 in effect when AOL offered Green, "Unlimited Internet" access, nor is there a dispute that there was no disclaimer that limited the access to the Internet or made Green aware that they blocked parts of the Internet. AOL also does not dispute that they block parts of the Internet.

Here is the Statue;

> N.J.S.A. 56:8-2. Fraud, etc., in connection with sale or advertisement of merchandise or real estate as unlawful practice.
>
> The act, use or employment by any person of any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing, concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise or real estate, or with the subsequent performance of such person as aforesaid, whether or not any person has in fact been misled, deceived or damaged thereby, is declared to be an unlawful practice;

Now AOL and Green may have a different opinion on what the statue means, but Green cited, CHATTIN V. CAPE MAY GREENE, INC. 124 N.J. 520, at 522, 591 A.2d 943 (S. Ct. 1991), in his Appeal brief that says misleading advertisement is consumer fraud. This is a case by New Jersey's highest Court.

Now for the sake of argument let's cross out the word, "Unlimited" and just say it means access to the Internet, well that still a major, concealment, suppression or omission, when they knew they were blocking parts of the Internet already. We don't know all the websites and newsgroups that AOL blocks, they have not denied blocking parts of the Internet, and only Discovery can show that. Seeing the problem they had, AOL tries to turn this back to the Member Agreement, but that has nothing to do with the misleading advertisement Count, they are separate issues. AOL never claimed that the advertisement also contains what's in the Member Agreement. You can't cure misleading advertisement by a later contract. SEC 230 does not shield

them either, Sec 230 does not say you may use misleading advertisement and you will be held harmless.

The Internet is one thing, you can't break it up and still have the Internet. AOL makes no claim to inventing the Internet and AOL does not define what the Internet is either. AOL was free to advertise their service with or without the Internet. They could have advertised AOLnet and picked parts of the Internet they wanted to supply. Or advertised partial Internet access. But once they told people that they would supply access to the Internet, knowing full well they are not, and conceal, suppress, or omits that material fact in their advertisement, they have clearly violated NJCFA.

CONCLUSION

I realize that I'm just a Pro-se, and there are very important issues too be decided. If this court grants my petition and I prepare my case badly I could do more harm than good, but I think it's a case worth hearing.

I feel the issues are so clear, the case law so compelling that even a Pro-se can present a reasonable case on the issues. I also believe that the vision the founding fathers had was one where a common citizen, with a reasonable case, could present it to the highest court in the land.

Respectfully Submitted,

_____

John Green DATED: May 8 2003

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
NO. 01-1120
JOHN GREEN.
Appellant
V.
AMERICA ONLINE (AOL); JOHN DOES 1 & 2
On Appeal From the United States District Court
For the District of New Jersey
(D.C. Civ. No. OO-cv-03367) District Judge: Honorable Joseph A. Greenaway, Jr.
Submitted Under Third Circuit LAR 34.1 (a) November 15, 2002
SLOVITER, RENDELL AND ROSENN, Circuit Jud^
SUR PETITION FOR REHEARING
The petition for panel rehearing filed by Appellant having been submitted to the judges who participated in the panel decision of this Court, and a majority of the judges on the panel not having voted for rehearing, the petition for panel rehearing is SED
BY THE COURT:
s/ Max Rosenn
Circuit Judge
Date: Feb. 1 2 2003

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
NO. 01-1120

JOHN GREEN,
Appellant
V.

AMERICA ONLINE (AOL); JOHN DOES 1 & 2

On Appeal From the United States District Court
For the District of New Jersey

(D.C. Civ. No. OO-cv-03367) District Judge: Honorable Joseph A. Greenaway, Jr. Submitted Under Third Circuit LAR 34.1 (a) November 15, 2002

SLOVITER, RENDELL AND ROSENN, Circuit Judges

CORRECTED JUDGMENT

This cause came to be heard on the record from the United States District Court for the District of New Jersey. On consideration whereof, it is now here ORDERED AND ADJUDGED by this Court that the judgment of the District Court entered on December 21, 2000, be, and the same is, hereby affirmed.Costs taxed against Appellant. All of the above in accordance with the Opinion of the Court.

ATTEST:
S/ Kathleen Brouner

Chief Deputy Clerk DATED: January 16, 2003

Certified as a true copy and issued in lieu of a formal mandate on 2/20/03

Teste: S/ Marcia M Waldron
Clerk, U.S. Court of Appeals for the Third Circuit.

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT
October 31 2002

No.01-1120
John Green
v.
America Online(AOL); John Doe 1 & 2

(US. Dist of NJ, Civil No. OO-cv-03367) PRESENT:
SLOVITER, RENDELL AND ROSENN, CIRCUIT JUDGES

1. Motion by Appellant to Supplement the district Court Record.

2. Response by Appellee to Appellant's Motion to Supplement the Record.

Gregory A. Stephens 267-299-4943 Brief Specialist
LISTED FOR DISPOSITION: NOVEMBER 15, 2002 /zm
ORDER

The foregoing Motion is denied. The papers submitted is not part of the record in this district Court

By the Court,
S/ Max Rosenn
Circuit Judge
Dated: DEC 0 6 2fl02
GAS/cc: JG
scj

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY ORIGINAL FILED

ORIGINAL FILED
DEC 20 2000
WILLIAM T WALSH CLERK
CLOSED

John Green,
Plaintiff,
V.

Civ. No. 00-3367 (JAG)
ORDER

America Online, Inc. and John Does 1 and 2,
Defendants.

GREENAWAY, JR., District Judge

This matter having come before the Court on the motion of Defendant America Online, Inc. ("AOL") to dismiss all counts of Plaintiff s Complaint against AOL for failure to state a claim upon which relief can be granted, pursuant to Fed. R. Civ. P. 12(b)(6); and good cause appearing,

IT IS on this 20 day of December, 2000,

ORDERED that AOL's motion to dismiss counts II, IV, VIII, X, XI, XII, XIII, and XIV is GRANTED;

IT IS FURTHER ORDERED that counts I, III, V, VI, VII, and IX are REMANDED to the Superior Court of New Jersey, Middlesex County;

IT IS FURTHER ORDERED that Defendant's motion for a change of venue is DENIED as moot; and

IT IS FURTHER ORDERED that a copy of this Order be served on all parties within seven (7) days of the date of this Order.

S/Joseph A. Greenaway Jr.
Joseph A. Greenaway Jr. U.S.D.J.

UNITED STATES DISTRICT COURT DISTRICT OF NEW JERSEY
(973) 622-4828

CHAMBERS OF JOSEPH A. GREENAWAY, JR.
JUDGE
Martin Luther King Jr. Courthouse
P.O. Box 999 Newark, New Jersey 07101-0999

ORIGINAL FILED
DEC 20 2000
WILLIAM T WALSH CLERK

LETTER OPINION ADDRESSING MOTION TO DISMISS
December 20, 2000

John Green
69 Duclos Lane Edison,
NJ 08817
Michael J. Canavan, Esq.
Jamieson, Moore, Peskin & Spicer
300 Alexander Park Princeton, NJ 08543-5276

Re: Green v. America Online. Inc.,and John Does 1 and 2. Civ. No. 00-3367

Dear Litigants and Counsel:
This matter comes before the Court on Defendant America Online's ("AOL") motion to dismiss pro se Plaintiff John Green's ("Green") complaint, pursuant to Fed. R. Civ. P. 12(b)(6).

BACKGROUND

Plaintiff originally filed a complaint in the Superior Court of New Jersey, Middlesex County, to which Defendant AOL responded with a motion to dismiss.

Before the motion could be decided. Green amended his complaint, adding a claim that AOL violated his First Amendment rights. AOL then removed this case to federal court based on that constitutional claim, and subsequently filed a motion to dismiss. Green then filed a motion to remand his case back to state court. This Court denied Green's motion on October 23, 2000.

Green subscribed to AOL, using the screen name "Lawyerkiii." A subscriber to AOL must agree to the terms of its Member Agreement, which includes a Terms of Service agreement and AOL's "Community Guidelines."[1] The Member Agreement outlines the conduct to which its members must conform, as well as the protections that AOL offers to them. Green makes the following allegations. At a time when he was visiting the "Romance-New Jersey Over 30" chat room, John Doe 1, a.k.a. "LegendaryPOLCIA," sent a computer program (called a "punter") to Green which locked up his computer, which caused Green to lose five hours of work valued at $400.

[1]Since Plaintiff specifically cites to and relies on this Agreement in his Amended Complaint (see. e.g. Am. Comp. Para 20, 40, 52, 76), the document is not a "matter[] outside the pleading 'under Fed. R. Civ. P. 12 and may therefore be considered by this Court on a motion to dlsmiss- In re Burlington Coat Factory Sec Litig., 114 F.3d 1410, 1426 (3d Cir 1997) (holding that a document integral to or explicitly relied upon in the complaint may be considered on a motion to dismiss).

John Doe 1 sent punters to Green's computer on five subsequent occasions. That same evening, John Doe 2, a.k.a. "Lawyerkiii" also visited that same chat room. Apparently, when capitalized, the letter 'I' appears as "I," thus, "Lawyerkiii" appeared as "Lawyerkiii." John Doe 2, knowing the similarities between the two names, impersonated Green and sent messages to the other men in the chat room, asking them for gay sex. Additionally, John Doe 2 sent messages to the women in the chat room and told them that Green was bi-sexual. Allegedly, this ruined Green's chances of meeting women. Green believes that John Does 1 and 2 are the same party. Green alleges that he provided AOL with evidence of John Doe 1's activity, but AOL took no action to stop it. Although Green also alleges that "this problem continues," he does not explain how it is continuing or what damage he is now suffering. While AOL did not specify under which rule it brought its motion to dismiss, a review ofAOL's briefs makes it apparent that the motion has been brought under Fed. R. Civ. P. 12(b)(6).

LEGAL STANDARD

A motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) may be granted only, if accepting all well pleaded allegations in the complaint as true, and viewing them in the light most favorable to plaintiff, plaintiff is not entitled to relief. Nami v. Fauver. 82 F.3d 63, 65 (3d Cir. 1996). The Court may not dismiss the complaint unless plaintiff can prove no set of facts which would entitle him to relief. Conlev v. Gibson. 355 U.S. 41, 45-46 (1957); Graves v. Lowerv. 117 F.3d 723, 726 (3d Cir. 1997). "The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." Scheuer v. Rhodes, 416 U.S. 232, 236 (1974). In setting forth a valid claim, a party is required only to plead "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a).

Thus, the "complaint must set forth sufficient information to suggest that there is some recognized legal theory upon which relief may be granted." District of Columbia v. Air Florida. 750 F.2d 1077, 1078 (D.C. Cir. 1984).

DISCUSSION

Although Green's Amended Complaint is not especially clear, it appears that his claims against AOL fall into four general categories: (1) tort; (2) breach of contract; (3) violation of the First Amendment; and (4) consumer fraud.

I. Tort Claims fCounts II, IV, VIII, and XID

Green's tort claims basically allege that AOL negligently failed to live up to its contractual obligations to Green, by refusing to take the necessary action against John Does 1 and 2 that would prevent them from further harming and defaming him. These counts should be dismissed because AOL is immune from liability, pursuant to 47 U.S.C. 230.[2]

[2]This section provides, in pertinent part that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. 230(c)(l). Interactive computer service means: any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.

47 U.S.C. 230(f)(2).

The two circuit cases that address 230 immunity both held that the defendant, who coincidentally was AOL, was immune from liability as a result of the actions of a third party using AOL's service.[3] See Ben Ezra. Weinstein & Co. v. America Online, Inc.. 206 F.3d 980 (10th Cir. 2000) (holding that AOL was immune from liability for posting incorrect information regarding plaintiffs stock, pursuant to 230, since AOL received its information from third parties); Zeran v. America Online, Inc.. 129 F.3d 327 (4th Cir. 1997) (holding that AOL was immune from liability for not removing postings attributing offensive materials to plaintiff, pursuant to 230, since a third party, not AOL, posted this information).

"Congress clearly enacted 230 to forbid the imposition of publisher liability on a service provider for the exercise of its editorial and self-regulatory functions." Ben Ezra. Weinstein & Co.. 206 F.3d at 984-85. Furthermore, [b]y its plain language, 230 creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service. . . . Thus, lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions-such as deciding whether to publish, withdraw, postpone or alter content-are barred. Zeran. 129 F.3d at 330.

Green argues that AOL is equitably estopped from relying on 230 because AOL waived its immunity in its

[3]There are only seven other reported federal cases and four state cases that have addressed 230 immunity in this context. These cases all had holdings similar to Ben Ezra. Weinstein & CCL and Zeran. Additionally, there was a criminal case that touched on 230 immunity, but it did not focus on the issues presented in this case.

contract with Green. Green is incorrect. Paragraph 3 of the Member Agreement provides that: "AOL does not assume any responsibility or liability for content that is provided by others. AOL does reserve the right to remove content that, in AOL's judgment, does not meet its standards or does not comply with AOL's current Community Guidelines, but AOL is not responsible for any failure or delay in removing such material." Thus the Member Agreement clearly states that rather than waiving its immunity, AOL virtually tracked the provisions of Sec 230 by indicating that it did not accept responsibility for the actions of third parties.

As for Green's equitable estoppel argument, this too must fail. The doctrine of equitable estoppel requires that a plaintiff prove that he was harmed due to the detrimental reliance upon a false representation of material fact. Mein v Federal Deposit Insurance Corp.. 88 F.3d 210, 221(3d Cir. 1996). It is clear from a plain reading of the Member Agreement, that AOL did not make a false representation; in actuality, it complied with its agreement. Thus, the MemberAgreement is in conformity with Sec 230.

Green next argues that John Doe 1's communication falls outside the reach of Sec 230 because the "punter" was a harmful "signal," which he claims is not information. Webster's New International Dictionary 1160 (3d ed. 1976), however, includes "a signal" as one of its definitions for information. By its very nature, the use of the Internet entails using or sending a great many signals. A narrow interpretation of the term "information," would thus make interactive service providers, such as AOL, liable only for items that are written, and not the potentially more dangerous transmissions such as computer viruses. Such a construction would run afoul of the protection Congress intended to give interactive service providers by enacting Sec 230.

Green's next argument, that Sec 230 is unconstitutional, is rather vague. Green asks the Court not to "interpret 47 U.S.C. Sec 230 to mean that AOL or any [Internet service provider] can unreasonably restrict Green's free speech on the Internet, or what he can view on the Internet." (Pl.'s Br. at 17.) "Congress considered the weight of the speech interests implicated [in screening the millions of postings on the Internet] and chose to immunize service providers to avoid any such restrictive effect" on free speech. Zeran. 129 F.3d at 331. Thus, rather than hindering free speech activities, Sec 230was enacted to promote free speech.

Accordingly, the tort claims of Counts II, IV, VIII, and XI of Green's Amended Complaint are DISMISSED.

II. Breach of Contract Claims (Counts II, IV. VIII, and X)

Green has not identified the specific provisions of the Member Agreement that AOL allegedly breached. It appears, however, that Green's claim is premised on AOL's failure to stop John Does 1 and 2 from violating AOL's "community guidelines." Counts 2, 4, 8, and 10 should be dismissed because AOL has not breached its contract. Membership as an AOL member is contingent upon accepting the terms of its Member Agreement. (Member Agreement at 1.) The Member Agreement provides, among other things, that:

> AOL does not assume any responsibility or liability for content that is provided by others. AOL does reserve the right to remove content that, in AOL's judgment, does not meet its standards or does not comply with AOL's current Community Guidelines, but AOL is not responsible for any failure or delay in removing such material. (Member Agreement Para 3.)

The Member Agreement also stated that AOL would not be liable for damages arising from use of AOL or the Internet, and that the Community Guidelines and the enforcement of those policies, were not intended to confer any rights or remedies to the user. (Member Agreement Para 5, 8.) It is thus clear that AOL did not promise to protect Green from the acts of other subscribers.

Green next argues that the Court should ignore the entire Member Agreement and rely solely on the Community Guidelines, because the Member Agreement is "so oppressive, unreasonable, unconscionable and . . one sided." (Pl.'s Br. at 3.) The basis for his argument appears to be that the Member Agreement does not guaranty that its members will always have or will always be able to access the service. (Id.) Again, a plain reading of the Member Agreement indicates that AOL is simply disclosing to its users the possibility that unavoidable events, such as computer crashes, problems with telephone connections, and other technical difficulties, may occur.

AOL has used the Community Guidelines to tell its subscribers what they can expect from AOL, as well as the kind of online behavior they expect in return. (Community Guidelines at 1, 2.) AOL also warns its subscribers that it cannot "possibly monitor all of [the contents on its service], and [does] not attempt to do so. Therefore, [a subscriber] might occasionally encounter something [he does not] want to see." (Id) Additionally, AOL warns that "[u]se of the Internet is at [a subscriber's] own risk, and AOL cannot be responsible for the content and conduct [he] may encounter." (Id. at 3.) Rather than being unconscionable, it is clear that AOL has attempted to inform its subscribers of potentially offensive situations that may occur.

The plain language of the Member Agreement forecloses any claims by Plaintiff that AOL breached its obligations. Hence, no analysis of the elements of a breach of contract claim is necessary and Counts II, IV, VIII, and X of Green's Amended Complaint are DISMISSED accordingly.
III.

First Amendment Claim (Count XII)

Green alleges that the Community Guidelines impinge on his First Amendment right to freedom of speech, and seeks injunctive relief. "As a general principle, the federal constitutional guarantees of personal rights are enforceable as against federal or state governments only, and not as against private individuals." Hoagburg v. Harrah's Marina Hotel Casino, 585 F. Supp. 1167, 1171. (D.N.J. 1984): see Lugar v. Edmonson Oil Co.. 457 U.S. 922, 936 ("most rights secured by the Constitution are protected only against infringement by governments"). Green attempts to sidestep this issue by arguing that the Internet is like a traditional public forum, which would thus require AOL to allow all free speech activities. This argument fails because AOL's service is not devoted to public use. Rather, to use AOL's network, parties must subscribe and pay for that privilege.
Thus, Green's First Amendment claim of Count XII must be dismissed because AOL is not a public party.

IV. Consumer Fraud Claims (Counts XIII and XIV)

Green's final allegation is that AOL has committed consumer fraud because after promising its users unlimited Internet access and e-mail, AOL then sued certain outside companies to block them from sending objectionable or unlawful e-mails. The New Jersey Consumer Fraud Act ("NJCFA") 56:8-2 states that deception, fraud, or any

unconscionable commercial practice are among the practices declared to be unlawful. "The NJCFA allows private plaintiffs to bring suit if they are harmed by an unconscionable commercial practice." Suberv.ChryslerCorp., 104 F.3d 578, 586 (3d Cir. 1997). "The standard of conduct that the term 'unconscionable' implies is a lack of good faith, honesty in fact and observance of fair dealing." Gennari v. Weichert Co. Realtors. 288 N.J. Super. 504, 533 (App. Div. 1996).

AOL has not acted unconscionably, nor was its Member Agreement dishonest or entered into in bad faith. The Member Agreement specifically provides that AOL has the right to "take any and all legal and technical remedies to prevent unsolicited bulk e-mail from entering, utilizing, or remaining within the AOL Network." (Member Agreement Para 3.) AOL exercised this right on several occasions in order to protect its members from materials that it considered to be objectionable to its subscribers-hardly unconscionable actions. In addition, 230(c)(2) provides AOL with immunity for this alleged activity since an interactive computer service shall not be held liable on account of "any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be ... objectionable." Counts XIII and XIV of Green's Amended Complaint must be dismissed because he has failed to state a claim upon which relief may be granted under the NJCFA, and 230 provides AOL immunity for its alleged actions.

IV. Remaining Claims Against John Doe 1 and John Doe 2

If it appears that the federal claim is subject to dismissal under Fed. R. Civ. P. 12(b)(6) or could be disposed of on a

motion for summary judgment under Rule 56, then the court should ordinarily refrain from exercising pendent jurisdiction in the absence of extraordinary circumstances. Tully v. Mott Supermarkets. Inc.. 540 F.2d 187, 196 (3d Cir. 1976).

Since all of the counts against AOL have been dismissed by the Court, Counts I and III of Green's Amended Complaint remain against John Doe I, and Counts V, VI, VII, and IX remain against John Doe 2. None of these remaining claims assert First Amendment violations, nor can they, since it is conceded that John Does 1 and 2 are private individuals and therefore not state actors. While the ultimate merit of these claims is questionable, this Court refrains from exercising pendent jurisdiction over these remaining state claims. Accordingly, adjudication of these claims is remanded to state court.

Conclusion

Defendant's Motion to Dismiss Counts II, IV, VIII, X, XI, XII, XIII, and XIV is GRANTED, pursuant to Fed. R. Civ. P. 12(b)(6). Counts I, III, V, VI, VII, and IX are remanded to the Superior Court of New Jersey, Middlesex County. Defendant's motion for a change of venue is DENIED as moot.

Very Truly your,
S/Joseph A. Greenaway Jr.
Joseph A. Greenaway Jr. U.S.D.J,

The America Online Member Agreement is a legal document that details your rights and obligations as an AOL member. You cannot become an AOL Member until you have accepted the terms of the Member Agreement. The Member Agreement provides very important information about your AOL membership, so you should take the time to read and understand it. If you have questions about the Member Agreement, or about your rights and responsibilities as an AOL member, please contact us by e-mail by clicking here. You should also take the time to review the AOL Privacy Policy and the AOL Community Guidelines which reflect AOL's current policies. The Internet and online world is changing rapidly and as technology and AOL's business continue to evolve,these policies may have to be updated or revised. Since these Privacy Policies and Community Guidelines may change, you should check Keyword: TOS for the most current versions.

For the same reasons, it may be necessary for AOL to update or revise certain provisions of the Member Agreement. By joining AOL and accepting the Member Agreement you agree that AOL may change the terms of this Member Agreement. If AOL makes material changes or revisions to the Member Agreement, we will provide notice to you thirty days in advance. If you don't agree to the changes proposed by AOL, or to any of the terms in this Member Agreement, your only remedy is to cancel your AOL membership.

1. THE BASICS OF YOUR AOL MEMBERSHIP This Agreement is your entire agreement with AOL and governs your use of the AOL Internet online service. There may be additional terms and conditions if you use affiliate services like our international areas, other AOL services or products such as AOL Instant Messenger (TM) service or third-party software and/or services. To access the AOL service you must accept the terms of this Agreement and comply with the AOL Community Guidelines. To be an AOL member, you must be

at least 18 years old. If you are not yet eighteen years old, you may still use AOL, but only if the account was created and registered by your parent or guardian. Because we give out free trial offers, we reserve the right to limit you to just one free trial..

When you accept this Agreement and complete the AOL registration process, you become the "master account" holder, and AOL provides you with a limited, nonexclusive license for no more than the term of your membership to use the screen name you select for your "master account." AOL also allows you to have up to four additional "sub-accounts" or screen names of your choice. Your screen name is your online identity. You may not use a screen name that is used by someone else, and your screen name cannot be vulgar, or be used in any way that violates the other parts of the Member Agreement or the Community Guidelines.

As the master account holder, you are responsible for all activity on your account and on any of the sub-accounts, and violations or warning accrued by the sub-account can lead to termination of the master account. If warnings or violations are received by sub-accounts, the master account will also receive notification. You may also receive important notices about your membership from time to time that may not be provided to the sub-accounts, so it is important for you to regularly check your master account mailbox. Because you are responsible for all use of your account, you should supervise the use of your account by others. This is especially important when children are using the service; children are safer online and get more out of the experience with adult supervision. It is important that you not reveal your password to other users and AOL will never ask you for your password. You agree not to reveal your password to other users and you agree to indemnify

and hold AOL harmless for any improper or illegal use of your account. This includes illegal or improper use by someone to whom you have given permission to use your account. Your account is at risk if you let someone use it inappropriately. If your membership is terminated for violating this Agreement or the Community Guidelines, AOL's express permission will be necessary before you are allowed to use AOL again.

2. CHARGES, BILLING AND THE FREE TRIAL
AOL reserves the right to change our fees or billing methods at any time and AOL will provide notice of any such change at least thirty days in advance in the same manner described above for changes to the Member Agreement. AOL also has the right to collect applicable taxes and impose premium surcharges for some areas of the service and these surcharges may apply even during your free trial. The answers to many common billing questions can be found by going to Keyword: Help. then selecting Accounts & Billing, going to Keyword: Billing, or by contacting an AOL customer service representative at 1-800-827-6364. If you don't like the changes in fees or billing methods, you may cancel your membership at any time, but AOL will not refund any remaining portion of the monthly fee when you cancel your membership. If you have joined AOL as a trial member, you should understand that your free trial time must be used within one month of your initial sign-on and to avoid being charged a membership fee, you must cancel your account before the end of that first month.

As the master account holder, you are responsible for all charges incurred, including applicable taxes and purchases made by you or anyone you allow to use your account or sub-accounts, including your children, other members of your family or friends. This means that, unless your account or credit card information is

obtained unlawfully or fraudulently by someone other than those authorized to use your account or sub-account, you will be responsible for all usage and purchases under your account or sub-accounts.

There may be extra charges to access certain premium content on AOL. AOL will provide notice of any extra charge before you enter the premium area. You are responsible for any charges for premium content incurred using your account (including sub-accounts) and these charges apply even during the free trial. AOL's Parental Controls allow you to prevent sub-accounts from accessing premium or surcharged content. For more information go to Keyword: Parental Controls. Some Web sites charge separate fees, which are not included in the cost of your AOL membership. AOL provides access to a large number of third-party vendors, who provide content, goods and or services on the AOL service or the Internet. Any separate charges or obligations you incur in your dealings with these third-parties are your responsibility and are not part of the fee charged for your AOL membership.

Most members pay by credit card. For most billing plans we will be charging your designated card every month, but some charges may accumulate on your account before they are charged to your card. If you don't have a credit card, you can authorize AOL to make electronic fund transfers from your checking account. There is an additional surcharge for this payment option and you should go to Keyword: Billing and read about AOL's Billing Methods for more information. By selecting this billing

option and providing AOL with your debit/checking account information, you authorize AOL to debit your checking account for charges incurred using AOL. Every time you use AOL, you re-affirm that AOL is authorized to charge your credit card or withdraw funds via electronic transfer from your checking account, depending on which payment method you have selected. You also agree to authorize AOL to charge purchases you make online to the credit card you supplied to AOL when you joined or to debit your checking account if you selected that option during the registration process.

We expect you to pay your account balance on time. We will give you 30 days from the date on your account statement to pay your bill. AOL will assess an additional 1.5 (or the highest amount allowed by law, whichever is lower) per month late charge if your payment is more than 30 days past due. That amount is also due immediately. You are responsible and liable for any fees, including attorney and collection fees, that AOL may incur in its efforts to collect any remaining balances from you.. You also agree that you will be billed for and will pay any outstanding balances if you cancel your membership or are terminated. You should let us know about any billing problems or discrepancies within 90 days after they first appear on your account statement. If you do not bring them to AOL's attention within 90 days, you agree that you waive your right to dispute such problems or discrepancies.

AOL has an extensive network of access phone numbers throughout the country, but it is still possible that the nearest AOL access number might be a long distance or toll call from your location. Any telephone charges incurred connecting to AOL are your responsibility. Since these charges are your responsibility, you should contact

your local telephone company if you have a question about whether an AOL access number is a long distance or toll call from your location. AOL also provides several surcharged 800 or 888 access phone numbers (for the current surcharge rate go to Keyword: Access). If you choose to use these surcharged numbers to access AOL. you agree to pay the currently applicable surcharge to AOL. If you have other questions about access phone numbers, you should consult Keyword: Access. It is important to note that you can incur long distance or toll charges or surcharges for 800 or 888 access even during your free trial.

3. ONLINE CONDUCT AND CONTENT

Content

By content, we mean the text, software, communications, images, sounds and other information provided online. Most content on the AOL service is provided by AOL, our members, our affiliates, or independent content providers under license. In general, AOL does not prescreen content available on the AOL service. AOL does not assume any responsibility or liability for content that is provided by others. AOL does reserve the right to remove content that. in AOL's judgment, does not meet its standards or does not comply with AOL's current Community Guidelines, but AOL is not responsible for any failure or delay in removing such material. Keep in mind that AOL is not responsible for content available on the Internet, although we reserve the right to block access to any Internet area containing illegal or other harmful content or otherwise being used for purposes that are unlawful or injurious to AOL or its members.

One of the most exciting aspects of this medium is that individual members have the ability to create their own content and voice their own opinions. AOL encourages Members to participate and express their views - after all,

that is what makes your experience interactive. But it is important to remember that there are rules and standards that you must abide by as an AOL Member. These rules and standards are described in the AOL Community Guidelines. As an AOL Member, you agree to follow the AOL Community Guidelines and you acknowledge that AOL has the right to enforce them in its sole discretion. This means that if you, or anyone using your account, violate the AOL Community Guidelines, AOL may take action against your account. This can range from the issuance of a warning about a violation to the termination of your account. You understand AOL is not required to provide notice prior to terminating your account for violating these rules and standards, but it may choose to do so. Additionally, as an AOL member, you may have access to other AOL branded services, such as AOL Instant Messenger(TM) service, that are available to both AOL members and to other Internet users. When using these AOL branded services, your conduct remains subject to this Member Agreement; however, non-AOL members who use these services are not subject to this Member Agreement and as a result you understand that these other users may not be governed by the same rules or standards. Because of the changing nature of the Internet and Online Services, the Community Guide lines may change at any time. You can always find the most current version of the AOL Community Guidelines at Keyword: TQS.

Unsolicited Bulk E-mail

Your AOL membership allows you to send and receive e-mail to and from other AOL members and users of the Internet. This does not mean that you may use AOL to send unsolicited bulk e-mail or junk e-mail. Information about unsolicited bulk e-mail can be found at Keyword: Junk Mail. Your AOL membership and your authorization to use the AOL e-mail service do not allow you to send un

solicited bulk e-mail or to cause unsolicited bulk e-mail to be sent by someone else. You may not use the Member Directory or any other area of AOL to harvest or collect information, including screen names, about AOL members, and the use of such information for the purpose of sending unsolicited bulk e-mail is strictly prohibited. Any violation of these provisions can subject your AOL account to immediate termination and further legal action. If you have received junk e-mail and want to report it, simply use the Forward button on the e-mail screen and send the email to screen name TOS Spam. AOL also reserves the right to take any and all legal and technical remedies to prevent unsolicited bulk e-mail from entering, utilizing or remaining within the AOL Network.

Proprietary Rights

Much of the content available on our service is owned by others, and is protected by copyrights, trademarks, and other intellectual property rights. It is very easy to copy things in cyberspace, but just because it is easy doesn't mean it is acceptable or legal. Any content that you upload or download while using the service must be authorized; this means you must have the legal right to upload or download the content. You must not copy, transmit, modify, distribute, show in public or in private or create any derivative works from any of the content you find on AOL, unless you have the legal right to. Making unauthorized copies of any content found on AOL can lead to the termination of your AOL account and may even subject you to further legal action beyond the termination of your membership. Similarly, other content owners may take criminal or civil action against you. In that event, you agree to hold Harmless AOL and its subsidiaries, affiliates, related companies, employees, officers, directors and agents.

Bear in mind that some areas of AOL are "public." like

message boards, forums, or the Member Directory, and other members will have access to your posted material and might copy, modify or distribute it. By submitting or posting content there, you are representing that you are the owner of such material or have authorization to distribute it. Once you post content on AOL, you expressly grant AOL the complete right to use, reproduce, modify, distribute, etc. the content in any form., anywhere.

4. AOL SOFTWARE LICENSES

AOL provides you with a limited license to use our software, which you agree to use in accordance with these rules. You may not sublicense, or charge others to use or access, our software without first obtaining written permission from us. We will occasionally provide automatic upgrades to improve your online experience, and we employ virus screening technology to assist in the protection of our network and our members. We reserve the right to log off accounts that are inactive for an extended period of time and we prohibit the use of tools that defeat AOL's automatic log-off feature. AOL grants to you a non-exclusive, limited license to use AOL software to connect to AOL from authorized locations in accordance with this agreement. This license is subject to the restriction that, except where expressly permitted by law, you may not translate, reverse-engineer or reverse-compile or decompile, disassemble or make derivative works from AOL software. You may not modify AOL software or use it in any way not expressly authorized by this Agreement. You understand that AOL's introduction of various technologies may not be consistent across all platforms and that the performance and some features offered by AOL may vary depending on your computer and other equipment.

5. WARRANTY

MEMBER EXPRESSLY AGREES THAT THE USE OF AOL.

AOL SOFTWARE, AND THE INTERNET IS AT MEMBER'S SOLE RISK AOL, AOL SOFTWARE, AOL PRODUCTS, THIRD-PARTY VIRUS CHECKING TECHNOLOGY AND THE INTERNET ARE PROVIDED "AS IS" AND "AS AVAILABLE" FOR YOUR USE, WITHOUT WARRANTIES OF ANY KIND. EITHER EXPRESS OR IMPLIED, UNLESS SUCH WARRANTIES ARE LEGALLY INCAPABLE OF EXCLUSION. AOL PROVIDES THE AOL SERVICE ON A COMMERCIALLY REASONABLE BASIS AND DOES NOT GUARANTEE THAT MEMBERS WILL BE ABLE TO ACCESS OR USE THE SERVICE AT TIMES OR LOCATIONS OF THEIR CHOOSING, OR THAT AOL WILL HAVE ADEQUATE CAPACITY FOR THE SERVICE AS A WHOLE OR IN ANY SPECIFIC GEOGRAPHIC AREA. AOL'S ENTIRE LIABILITY AND YOUR EXCLUSIVE REMEDY WITH RESPECT TO THE USE OF ANY SOFTWARE PROVIDED OR USED BY AOL SHALL BE THE REPLACEMENT OF ANY AOL SOFTWARE FOUND TO BE DEFECTIVE. YOUR SOLE AND EXCLUSIVE REMEDY FOR ANY OTHER DISPUTE WITH AOL IS THE CANCELLATION OF YOUR ACCOUNT AS DETAILED BELOW IN SECTION 7 IN NO CASE SHALL AOL BE LIABLE FOR CONSEQUENTIAL DAMAGES ARISING FROM YOUR USE OF AOL THE INTERNET OR FOR ANY OTHER CLAIM RELATED IN ANY WAY TO YOUR MEMBERSHIP WITH AOL. BECAUSE SOME STATES OR JURISDICTIONS DO NOT ALLOW THE EXCLUSION OR THE LIMITATION OF LIABILITY FOR CONSEQUENTIAL OR INCIDENTAL DAMAGES. IN SUCH STATES OR JURISDICTIONS, AOL'S LIABILITY SHALL BE LIMITED TO THE EXTENT PERMITTED BY LAW. AOL DOES NOT ENDORSE.

WARRANT OR GUARANTEE ANY PRODUCT OR SERVICE OFFERED THROUGH AOL AND WILL NOT BE A PARTY TO OR IN ANY WAY BE RESPONSIBLE FOR MONITORING ANY TRANSACTION BETWEEN YOU AND THIRD-PARTY PROVIDERS OF PRODUCTS OR SERVICES.

6. INDEMNIFICATION

Upon a request by AOL, you agree to defend, indemnify and hold harmless AOL and its affiliated subsidiaries, employees, contractors, officers, directors, telecommunications providers and content providers from all liabilities, claims and expenses, including attorneys fees, that arise from a breach of this Member Agreement for which you are responsible or from the use of AOL or the Internet, or in connection with your transmission of any Content on AOL. AOL reserves the right, at its own expense, to assume the exclusive defense and control of any matter otherwise subject to indemnification by a Member. In that event, the member shall have no further obligation to provide indemnification for AOL in that matter.

7. TERMINATION AND CANCELLATION

Either you or AOL may terminate or cancel your membership at any time. You understand and agree that the cancellation of your account is your sole right and remedy with respect to any dispute with AOL. This includes, but is not limited to, any dispute related to, or arising out of: (1) any term of this Agreement or AOL's enforcement or application of this Agreement; (2) any policy or practice of AOL. including AOL's Community Guidelines and the

AOL Privacy Policy, or AOL's enforcement or application of these policies; (3) the content available through AOL or the Internet or any change in content provided through AOL; (4) your ability to access and/or use AOL; or (5) the amount or type of fees, surcharges, applicable taxes, billing methods, or any change to the fees. applicable taxes, surcharges or billing methods.

You can cancel your membership by delivering notice to AOL's Customer Service Department at 1-888-265-8008, by sending your cancellation request via US Mail to: AOL, PO Box 1600, Ogden UT 84401, or by fax at 1-801-622-7969. Cancellation will take effect within 72 hours of receipt of your request, and AOL will send you written confirmation. If you cancel near the end of your billing period and are inadvertently charged for the next month's fee contact AOL at the toll free number above to have the charges reversed. AOL reserves the right to collect fees, surcharges or costs incurred before you cancel your AOL membership. In addition, you are responsible for any charges incurred to third-party vendors or content providers prior to your cancellation.

In the event that your account is terminated or canceled, no refund, including any membership fees, will be granted; no online time or other credits (e.g., points in an online game) will be credited to you or can be converted to cash or other form of reimbursement. Active AOL Members may not allow former Members or other agents whose memberships have been terminated to use their accounts. Any delinquent or unpaid accounts or accounts with unresolved issues with the Community Action department or other AOL departments must be concluded before you may re-register with AOL. Inc.

8. LAW AND LEGAL NOTICES

The Member Agreement represents your entire agreement with AOL. You agree that this Member Agreement is not intended to confer and does not confer any rights or remedies upon any person other than the parties to this Agreement. You also understand and agree that the AOL Community Guidelines and the AOL Privacy Policy, including AOL's enforcement of those policies, are not intended to confer, and do not confer, any rights or remedies upon any person. If any part of this Agreement is held invalid or unenforceable, that portion shall be construed in a manner consistent with applicable law to reflect, as nearly as possible, the original intentions of the parties, and the remaining portions shall remain in full force and effect. The laws of the Commonwealth of Virginia, excluding its conflicts-of-law rules, govern this Agreement and your membership. As noted above, member conduct may be subject to other local, state, national, and international laws. You expressly agree that exclusive jurisdiction for any claim or dispute with AOL or relating in any way to your membership or your use of AOL resides in the courts of Virginia and you further agree and expressly consent to the exercise of personal jurisdiction in the courts of Virginia in connection with any such dispute including any claim involving AOL or its affiliates, subsidiaries, employees, contractors, officers, directors, telecommunication providers and content providers.

You agree to abide by U.S. and other applicable export control laws and not to transfer, by electronic transmission or otherwise, any content or software subject to restrictions under such laws to a national destination prohibited under such laws, without first obtaining, and then complying with, any requisite government authorization. You further agree not to upload to AOL any data or software that cannot be exported without prior written government authorization, including, but not limited to, certain types of

encryption software. This assurance and commitment shall survive termination of this agreement. Control laws currently prohibit the export of any browser with 128-bit encryption, including Internet Explorer, available through AOL. Control laws also prohibit nationals of Cuba, Iran, Iraq, Libya, North Korea, Sudan and Syria from gaining access to certain content on AOL.

Information for California Residents:

Under California Civil Code Section 1789.3, California Members are entitled to the following specific consumer rights information:

Pricing Information. Current rates for using AOL may be obtained by calling 1-600-827-6364. AOL, Inc. reserves the right to change fees, surcharges, monthly membership fees or to institute new fees at any time upon thirty (30) days prior notice, as provided for in the Member Agreement at Section 2.

Complaints. The Complaint Assistance Unit of the Division of Consumer Services of the California Department of Consumer Affairs may be contacted in writing at 1020 N. Street, #501, Sacramento, CA 95814, or by telephone at 1-916-445-1254.

Like any city, we take pride in - and are protective of - our community. That's why our community standards are important. Communities of all sizes rely on civic pride and the duty of all citizens to help with things like picking up litter, getting out of the way of ambulances, reporting crime, and abiding by the law. These Community Guidelines tell you what you can expect from AOL, as well as the kind of online behavior we expect of you. We include some tips for protecting yourself online. Community standards are always evolving, so it's important that you periodically check these Guidelines (as well as the guidelines in your favorite areas) for updates, new information, or additional safety tips. It's all part of taking pride in and protecting the AOL community. Thanks for doing your part.

Here are the basics (read further for more detail):

* Appropriate online content.
* Proper online conduct.
* Illegal behavior.
* Unsolicited e-mail.
* Protection of copyrights and trademarks.
* Content and behavior on the Internet.
* International online areas.
* Getting help: Online resources.

Appropriate online content

By content, we mean the information, software, communications, images, sounds, and all the material and information you see online. It is provided by AOL, our international joint ventures, our members, or under license by our content partners. We do not pre-screen content generally, but our content partners are expected to ensure that their content on the service reflects our community standards. We reserve the right to remove content that does not meet those standards. Neither AOL nor its partners assume any liability if the content is not removed. Bear in mind that we

can do this only on the AOL service: we cannot do it on the Internet outside AOL. (see Content and Behavior on the Internet).

Members like you also generate content in chat rooms, message boards. Web pages, etc. It is essential that this kind of content also reflects our community standards, and we may remove it if, in our best judgment, it does not meet those standards. When we do, you may receive a warning about the violation of AOL's standards if your account (any of the screen names) was responsible for putting the objectionable content online. If it's a serious offense or you've violated our rules before, we may terminate your account.

AOL applies the same standards to its own and its partners' content that it applies to member content. Remember that community standards vary from community to community. Some chat rooms may use stronger language than others. Obviously, some online areas may deal with more adult-oriented topics, such as sexual dysfunction, rape, or infidelity, and we offer our members Parental Controls so that you may ensure that kids who use your account cant see that mature content (see Getting Help: Online Resources). In most places on AOL, vulgar language or sexually explicit conduct are no more appropriate online than they would be at Thanksgiving dinner. So while the guidelines may vary a bit depending on the online area you're in, in general, these guidelines apply:

Language: Mild expletives and non-sexual anatomical references are allowed, but strong vulgar language, crude or explicit sexual references, hate speech, etc. are not. If you see it. report it at Keyword: Notify AQL.

Nudity Photos containing revealing attire or limited nudity in a scientific or artistic context is okay in some

places (not all). Partial or full frontal nudity is not okay. If you see it. report it at Keyword: Notify AQL

Sex/Sensuality: There is a difference between affection and vulgarity. There is also a difference between a discussion of the health or emotional aspects of sex using appropriate language, and more crude conversations about sex. The former is acceptable, the latter is not. For example, in a discussion about forms of cancer, the words "breast" or "testicular" would be acceptable, but slang versions of those words would not be acceptable anywhere.

Violence and drug abuse: Graphic images of humans being killed, such as in news accounts, may be acceptable in some areas, but blood and gore, gratuitous violence, etc., are not acceptable. Discussions about coping with drug abuse in health areas are okay., but discussions about or depictions of illegal drug abuse that imply it is acceptable are not.

Please bear in mind that these are only guidelines; there is always a "gray area." Use your best judgment. Ask yourself if this is something that you would say in a room full of people you never met, or in the workplace. However, AOL makes the final determination about whether content is objectionable or not.

With all the content posted on AOL every day by our members, we cant possibly monitor all of it, and we do not attempt to do so. Therefore, you might occasionally encounter something you don't want to see. You can ignore it. but we prefer you report it using the Keyword: Notify AOL. Good judgment is important, especially when you encounter the opinions of others. AOL doesn't endorse or oppose opinions expressed by our members, but we do sometimes take issue with the manner in which the opinion is ex

pressed. Hate speech is never allowed.

Proper online conduct.

Online conduct should be guided by common sense and basic etiquette. You will be considered in violation of the Terms of Service if you (or others using your account) do any of the following:

* Post, transmit, promote, or distribute content that is illegal.
* Harass, threaten, embarrass, or do anything else to another member that is unwanted. This means: don't say bad things about them, don't keep sending them unwanted Instant Message(TM) notes, don't attack their race, heritage, etc. If you disagree with someone, respond to the subject, not the person.
* Transmit or facilitate distribution of content that is harmful, abusive, racially or ethnically offensive, vulgar, sexually explicit, or in a reasonable person's view, objectionable. Community standards may vary. but there is no place on the service where hate speech is tolerated.
* Disrupt the flow of chat in chat rooms with vulgar language, abusiveness, hitting the return key repeatedly or inputting large images so the screen goes by too fast to read, etc. This is online vandalism, and it ruins the experience for others.
* Pretend to be anyone whom you are not. You may not impersonate another member (including celebrities), an AOL employee, or a Community Leader.
* Attempt to get a password, other account information, or other private information from a member. Because a member's account is that person's online existence and persona, it is sacrosanct. Remember AOL employees will NEVER ask for your password. Don't give your password or billing information out to anyone.

Obey the rules wherever you are. This includes the rules of other interactive services, AOL area guidelines, state, local, federal laws, or foreign or international law where appropriate. Ignorance of the law is no excuse. "Netiquette" is used all over the Internet. Whether you are on AOL or using other Internet functions, it's important to be polite. Many newsgroups, Web communities, and the like have their own community guidelines or standards, and you should consult them before interacting.

Remember that new AOL features or technologies are always subject to the Terms of Service.

Illegal behavior.

The laws that apply in the offline world must be obeyed online as well. We have zero tolerance for illegal behavior on the service. We terminate accounts and cooperate with law enforcement on such matters.

In addition to providing you with an easy way to report illegal activity, we or our partners may in some instances monitor public areas. Our Community Leaders are there to help you and to help us maintain community standards. We do not monitor private areas, such as private chat rooms, Instant Message(TM) conversations, or e-mail. Regardless of the area. AOL may be used only for lawful purposes. Just because we may not be monitoring the area you're in at that point in time doesn't mean we wont uphold our standards. In addition, AOL reserves the right to treat as public any private chat room whose directory or room name is published or becomes generally known or available.

Unsolicited e-mail.

* Unsolicited bulk e-mail is strictly prohibited.

- Chain letters and pyramid schemes are not allowed. Many such things are illegal. Even the ones that aren't illegal are annoying to most people and tie up online resources, so we don't allow them.

* You may place advertisements only in areas designated for that purpose. Unsolicited advertising is not allowed. This includes the sending of bulk e-mail. You must have permission from AOL and/or the person to whom you are sending the ad.
* You may not use the Member Directory or any other area of AOL to harvest or collect information, including screen names, about AOL members, and the use of such information for the purpose of sending unsolicited bulk e-mail is strictly prohibited. This includes collection of names on a member Web page. You must adhere to AOL's Privacy Policy.
* You can regulate the mail you receive by going to Keyword: Mail Controls.

Mail Controls allow you to:
* Block or allow all e-mail
* Block or allow e-mail from specific addresses or from the Internet
* Block domains (the sources of the mail)
* Block file attachments to e-mail

Protection of copyrights and trademarks.
Some content is owned by others and is protected by copyrights, trademarks, and other intellectual property rights. It's very easy to copy things in cyberspace, but just because it's easy doesn't mean it's acceptable or lawful. Unauthorized copying of software is illegal, and you can be subject to criminal penalties beyond the termination of your membership. We take this seriously. Similarly, other content owners may take criminal or civil action against you. All the content you transmit must either be your own

or must be transmitted with express authorization for distribution on AOL.

Bear in mind that some areas of AOL are "public," like message boards, forums, or the Member Directory, and other members will have access to your posted material and might copy, modify or distribute it. By submitting content in these public areas, you grant to AOL the complete right to use, reproduce, modify, distribute, etc. the content in any part, anywhere.

Content and behavior on the Internet. AOL provides you with access to the Internet, which is different from AOL. E-mail to or from non-AOL members, newsgroups, FTP, the World Wide Web, etc. are outside of the boundaries of AOL. However, as an AOL member you are required to follow our TOS no matter where you are on the Internet. If another ISP or Internet organization reports you to us. we will take appropriate action against your account the same as we would if you had committed a violation on the AOL service.

AOL offers Web site publishing capability to encourage you to participate in a variety of online communities on AOL. We regard such communities as part of the AOL service, and we will enforce our community guidelines for member-created Web pages.

Use of the Internet is at your own risk, and AOL cannot be responsible for the content and conduct you may encounter. If the content or behavior originates outside the AOL community, we cannot remove it and are limited in the actions we can take. In addition, not every Web site you encounter will have a privacy policy and those that do may differ from AOL's. Be very careful about giving out personal information. Since the Internet contains goods and

services that may not be appropriate for minors (or some adults'), you may want to use our Parental Controls (Keyword: Parental Cōntrols) to block access to certain parts of the Internet for your account or sub-accounts, especially if kids are online in your home.

International online areas.

AOL also allows you to visit AOL International areas online. These areas may have slightly different rules for conducting yourself and different standards for acceptable content. You should refer to the local rules in those areas; in general, "when in Rome" do as the folks do there. For example, harmless words in the United States might take on a completely different meaning in the United Kingdom. Guides or hosts in those areas may issue you a warning, and termination is possible if you violate the rules of the international area. Bear in mind that cyberspace law is evolving, so it's a good idea to review the rules of your favorite areas frequently.

Getting help: Online resources.

Like the rest of the world, AOL may contain some material that is inappropriate for kids, young teens, or to some adults. Content in chat rooms is expressed immediately, so it can't be monitored in advance. Whether or not content is appropriate for children or for your tastes is up to you. We want to make sure that you have the ability to control what you or your children see.

AOL provides many online means of modifying the online environment, all of which can be controlled by the master account.

Parental Controls (Keyword: Parental Controls). Our Parental Controls allow the master account holder to adjust

the online access of children on that account as they mature. You can designate each screen name as a child, young teen, mature teen, or 18+ account. Designating an account as a child or young teen account restricts your child's access to certain areas on AOL and the Internet (when accessed through AOL) and to Internet services available through America Online, such as online transactions. Each of these restrictions can be customized. But remember: No system of controls makes up for good old fashioned parental supervision. We recommend that you monitor your child's use of AOL and that you make sure that your children understand AOL's Safety Tips.

Web Controls (Keyword: Parental Controls). Web Controls let you restrict your child's access to the World Wide Web. You can set controls to allow your child to go only to pre-approved sites, or prevent your teen from going to identified pornographic sites on the Web.

Mail Controls (Keyword: Mail Controls). Mail Controls allow you to:

* Block or allow all e-mail
* Block or allow e-mail from specific addresses or from the Internet
* Block domains (the sources of the mail)
* Block file attachments to e-mail

Marketing Preferences (Keyword: Marketing Preferences). AOL occasionally makes our membership mailing list available to companies whose products or services may be of interest to you. Marketing Preferences allows you to tell us if you do not want your name to be released to other organizations. You can also tell us if you do not want to receive member offers from AOL. For more information about online safety and security, check out the following:

Neighborhood Watch (Keyword: Neighborhood Watch). Neighborhood Watch is your online area for information about online safety and security, dealing with issues such as viruses, keeping your account secure, reporting violations, or online conduct.

Member Services (Keyword: Help). This area has answers to a wide range of questions about AOL's service.

How to Notify AOL of Problems Online

There are two ways to inform AOL's Community Action Team (CAT) of violations you have either seen or been subject to online. AOL's CAT is a highly trained group responsible for educating and empowering members and for enforcing AOL's content and conduct standards. CAT can issue written warnings and, should the violation(s) be serious enough, terminate an account.

You can notify AOL of a violation by going to Keyword: Notify AOL or Keyword: I Need Help. Using Keywords: TOS or Keyword: Terms of Service allows you to review these guidelines.

When in a chat room, you can also click the Notify AOL button. This allows you to report a problem without having to leave your chat room.

We regard our members' privacy as one of our most important values. We want you to know how we protect member information and what choices you have about its use. We believe AOL's Privacy Policy should give you confidence whenever you use AOL or AOL.COM - 24 hours a day, seven days a week. 365 days of the year.

We have organized our policy into three parts:

(1) We outline our Eight Principles of Privacy, our core commitment to protect your privacy.
(2) We explain how we implement each principle. You can click on any principle to read the policy.
(3) We provide Helpful Tips on how you can better protect your privacy in cyberspace. .

AOL'S PRIVACY COMMITMENT: THE EIGHT PRINCIPLES OF PRIVACY

We are committed to protecting your personal privacy. Our Eight Principles of Privacy summarize and clarify that commitment: how we safeguard your privacy, how we treat personal information, and what choices you have. We understand that for you to take full advantage of the benefits of this interactive medium, we must do everything we can to ensure that your privacy is secure.

1. We do not read your private online communications.
2. We do not use any information about where you personally go on AOL or the Web, and we do not give it out to others.
3. We do not give out your telephone number, credit card information or screen names, unless you authorize us to do so. And we give you the opportunity to correct your personal contact and billing information at any time.
4. We may use information about the kinds of products you buy from AOL to make other marketing offers to you, unless you tell us not to. We do not give out this purchase data to others.
5. We give you choices about how AOL uses your personal information. 6. We take extra steps to protect the safety and privacy of children.
7. We use secure technology, privacy protection controls and restrictions on employee access in order to safeguard

your personal information.

8. We will keep you informed, clearly and prominently, about what we do with your personal information, and we will advise you if we change our policy.

(1) We do not read your private online communications. AOL honors the confidentiality of its members' private communications in private chat rooms, e-mail (including downloads), and Instant Message™ conversations, as well as any profile data you may create, such as a stock portfolio. AOL does not read or disclose private communications except to comply with valid legal process such as a search warrant, subpoena or court order, to protect the company's rights and property, or during emergencies when we believe physical safety is at risk. Of course, what you write or post in public or member chat rooms and message boards is available not only to AOL, but to all members.

(2) We do not use any information about where you personally go on AOL or the Web, and we do not give it out to others.

Our system automatically gathers information about the areas you visit on our service.

We do not use any of this navigational data about where you - as an individual member - go on the service. Nor do we share any of this data with outside companies.

We do use navigational information in the aggregate to understand how our members as a group use the service so that we can make AOL better. We may also share this statistical information with our partners or other outside companies, but in doing so, we don't disclose individual names orpersonal navigational information.

We do not keep track of where you go on the World Wide

Web.

The Web sites you visit may have their own privacy policies or no policy at all. We encourage you to review the privacy policies of Web sites before providing them with any of your personal information.

(3) We do not give out your telephone number, credit card information or screen names, unless you authorize us to do so. And we give you the opportunity to correct your personal contact and billing information at any time.

When you join AOL, we ask you for your name, address, telephone number, and billing information-including the credit card, checking account, or debit card used to pay for your account - and the various screen names you want to use on your account. Here is how we protect that information:

* AOL will not give out your telephone number or screen names (e-mail addresses), except where needed to deliver a product or service you ordered.
* We will not give out your credit or debit card number or checking account information unless you authorize it, for example, during an online purchase.
* We will not give out information that would link your screen names with your actual name.

We make lists of members' names and addresses available to pre-screened companies who have specific direct mail product and service offers we think may be of interest to you. We also sometimes combine these lists with publicly available information or segment them based on other information, such as when a member joined AOL or a member's computer system type. These lists are never based on a member's online activities.

You may choose to remove your name and address from the mailing lists we provide to other companies. For more information about your choices, please see Principle 5.

We also collect and use other information for internal purposes. For example, we keep records in your account history of your complaints about other members' online behavior, your contact with AOL Member Services and any reported violations of our Terms of Service (TOS) that you or someone on your account may have committed. AOL automatically queries your computer for information about your computer system such as the speed of your modem, error messages you may have received or whether you use Macintosh(TM) or Windows™ software - to help us fit the service to your individual needs and to help us diagnose problems you may be having with your system. Finally, we sometimes use information about your geographical location to provide localized service. For example, we may use your zip code or the time zone you are in to make sure the weather information or TV listings yousee are accurate for you.

We have two exceptions to these policies: We will release specific information about your account only to comply with valid legal process such as a search warrant, subpoena or court order, or in special cases such as a physical threat to you or others.

We provide you with the opportunity to update or correct your contact and billing information that we have on file. Just as you want to make sure that information AOL has about you is accurate, we want to keep only the most up-to-date information about your account. Therefore, whenever you believe that your contact or billing information needs updating, you can go to Keyword: Billing and make the necessary changes.

(4) We may use information about the kinds of products you buy from AOL to make other marketing offers to you. unless you tell us not to. We do not give out this purchase data to others.

Your Purchases From AOL

AOL offers our members the opportunity to buy AOL store merchandise, such as computer hardware and software, and products that carry the AOL brand. Like other retailers and direct marketers, we record information about such purchases. When you buy from us online, our system automatically gathers purchase data, and we also record information about purchases madethrough our telemarketing, mail order and other marketing operations.

We use this information in two ways:

1) We review what kinds of products and services appeal most to our members as a group. This statistical information helps us improve our offerings in the same way that other companies change their catalog based on what sells best.

2) We use information such as the number of purchases members make and the categories of goods and services they buy to make offers to you that we believe will interest you. In addition, we use other information such as when members joined AOL. how often they use the service or their type of computer system to make such offers. We also use publicly available consumer data to help us decide which marketing offers to make and which advertising they see.

You may choose not to receive marketing offers from AOL For more information about your choices, please see Principle 5.

We do not give out any information about what you, as an individual, purchase from AOL, except to complete your transactions, or to comply with valid legal process such as a search warrant, subpoena or court order. We share with outside companies only statistical information about what AOL products or services our members - as a group - buy.

Your Purchases From AOL Certified Merchants

AOL Certified Merchants are required to provide a secure and safe environment for credit card purchases and will abide by AOL's privacy policy when handling any personal information given to them online by our members. These Certified Merchants will carry our AOL Guarantee Seal that tells you that you can conduct online business through AOL safely with them. Every time you make an online purchase from any AOL Certified Merchant, you are protected against liability in the unlikely event of credit card fraud. Simply follow your credit card company's reporting procedures, and AOL will reimburse you up to $50 for any remaining liability for unauthorized charges. Learn more at Keyword: Guarantee.

Your Other Online Purchases Through Our Service

For all other online purchases, be sure to review the merchants' privacy policies and contact them directly if you have any questions. They may have privacy terms that differ from AOL's privacy policy, and they may use personal information which you - may provide them differently than our policy permits.

AOL may be involved in facilitating your purchases from these other companies, but this individual data is not used for any other purpose.

(5) We give you choices about how AOL uses your personal information.

You have choices about how the information you have provided may be used by us to make special offers to you. And you can direct us to remove your name and address from mailing lists we provide to selected, pre-screened companies.

To activate any of these marketing preferences, go to Keyword: Marketing Preferences or Keyword: Choice or click on the My AOL button on the toolbar at the top of your screen.

* You may choose not to receive marketing offers from AOL by U.S. mail.
* You may choose not to receive marketing offers from AOL by telephone.
* You may choose not to receive marketing offers from AOL by e-mail.
* You may choose not to receive marketing offers from AOL through online "pop-up screens."
* You may choose to have your name and address removed from any mailing lists that we provide to other companies.

(6) We take extra steps to protect the safety and privacy of children.

Young people need special safeguards and privacy protection. We realize they may not understand all the provisions of our policy or be able to make thoughtful decisions about the choices available to adult members. So we have special privacy policies to protect kids and teens using areas on the service specifically designed for them, including our Kids Only Channel. And we urge all parents to teach their children about protecting their personal information while

online.

* In areas on the service designed for children 12 and under. AOL and its partners require prior parental consent (for example, by sending in a permission form by regular mail or by fax) before collecting or using names, addresses, telephone numbers or other information that identifies a child offline. In addition, prior to children using screen names on the AOL service, we require parental (master account) consent at the time the sub-account screen name is created. We do this so that parents are aware of and consent to how their children may use their screen names; for example, using the screen name to request an online newsletter, to post a message on a message board or to participate in a chat room.

In areas designed for teens 13 through 15. AOL and its partners may not collect names, addresses, telephone numbers or other personally identifiable information without disclosing how that information will be used and notifying teens that they should obtain permission from their parents before providing any information.

* Another way parents can control their child's experience online is AOL's Parental Controls (Keyword: Parental Controls). These simple, flexible tools allow parents to customize content and functionality to their child's maturity level.

Since one master account may have up to five screen names, we encourage all parents to use their master account to create separate screen names for each child. This allows the parent to customize AOL to their child's maturity level and content needs: Kids Only (recommended for children 12 and under); Young Teen (recommended for ages 13-15); or Mature Teen (recommended forages 16-17).

* Unsolicited e-mail is a problem for everyone, but it is particularly a problem for children. This includes mail that could contain content you may not want your children to see, or mail that may ask for information you would not want your children to give out.

If you want to minimize the unsolicited e-mail your children receive, you can use Mail Controls (Keyword: Mail Controls) to block all e-mail from the Internet or to select the e-mail addresses from which you wish to allow your children to receive e-mail. Remember that screen names and information voluntarily given by children and teens in public chat rooms, e-mail exchanges, message boards, the Member Directory, and other online communications are publicly available and may be used by other parties to generate unsolicited e-mail.

You can learn more about how to ensure a safe and enjoyable online experience for you and your family at Keyword: Neighborhood Watch.

(7) We use secure technology, privacy protection controls and restrictions on employee access in order to safeguard your personal information.

We use state-of-the-art technology to keep your personal information-including your billing and account information - as secure as possible. We also have put in place privacy protection control systems designed to ensure that your personal data remain safe and private.

Each and every AOL employee must abide by AOL's privacy policy. Only authorized AOL employees are permitted to have access to your personal information and such access is limited by need. For example, if you call our Member Services department with a concern or complaint,

the representative is allowed to access only the personal information that he or she needs to address your concern. In addition, any company with which AOL contracts to be our agent in conducting our business is required to adhere to confidentiality agreements to ensure that your information remains safe and secure.

All AOL employees are required to acknowledge that they understand and will comply with this privacy policy. Employees who violate our privacy policies are subject to disciplinary action, up to and including termination.

We strongly encourage our content, commerce and advertising partners to post clearly their own privacy policies and to have privacy control systems in place to protect your personal information. Be sure to review their privacy policies and contact them directly if you have any questions.

(8) We will keep you informed, clearly and prominently, about what we do with your personal information, and we will advise you if we change our policy.

A key part of AOL's commitment to protecting your privacy is explaining to you how we may use your personal information. This privacy policy serves that purpose, and it is accessible through several means within our service. When you register for our service you are presented with our privacy policy and should familiarize yourself with this and all other AOL policies at that time. In addition, this policy is easily located in our Termsof Service area (Keyword: TOS), and by using Keyword: Pnvacy, you can view AOL's privacy policy.

Whenever we change our policy, we will give you 30 days' notice of those changes through prominent disclosures, including notification on our front screen. If policy changes

Are substantial, we will notify each of our members individually through popup screens or e-mails Since pop-ups last only for a limited time, however, you should sign on to your account regularly for these and other important announcements.

If you'd like to comment on or have questions about our privacy policy, or if you have a concern or policy violation you wish to report, please go to Keyword: Privacy Questions.

TEN TIPS TO HELP YOU PROTECT YOUR PRIVACY AND SECURITY ONLINE

You can take the responsibility to protect your personal privacy online. Here is a checklist that will help safeguard your privacy and protect the integrity of your computer and AOL account. We urge you to print these tips and post them near your computer for you and your children.

___ (1) Never give your password to anyone online. Never give your billing information except to facilitate a purchase.

(2) Make your password at least 6 characters in length. Create a password that includes a combination of numbers and letters (such as sun8ray or bel3jar2 or 12hat93). Be sure to use different passwords for each screen name on your account.

___ (3) If you have fallen for an online scam and given out your password, change your password right away. Before you sign off go to Keyword: Password and create a new password for your screen name. Also., change the passwords for any other screen names on your account.

(4) Setting up a Member Profile about yourself can be a good way of connecting with communities of AOL members. But beware that Member Profiles are public. It's a good idea to avoid including information that could allow people to find you offline, such as your phone number or exact street address.

(5) Use AOL's Mail Controls(TM) feature to control the e-mail you and your children receive. You can block e-mail from the internet, entire domain names and specific e-mail addresses. You can even block the exchange of attached files or pictures in e-mail.

(6) Your computer cannot catch a virus by opening a piece of e-mail. But if the e-mail asks for a password or billing information, or contains a file attachment from someone you don't know, go to Keyword: Notify AOL to learn how to report it.

(7) Never download files unless you know what they are and who sent them to you. Computer viruses and destructive programs that could cause your computer to divulge personal information are often transferred in cleverly disguised files.

(8) When you leave the AOL environment to go on the Web, you may want to check the sites you visit to see if they have a privacy policy. Take special care to protect your personal information and your screen name, since the operators of Web sites are not bound by AOL's privacy policy.

___ (9) Explain to your children that some non-AOL contests could ask them for personal information, and make very clear what information they may or may not provide, under any circumstances.

___ (10) You can get instructions to report any violation by going to Keyword: Notify AOL. You can get answers to common questions, and more tips for protecting yourself online, by going to Keyword: Neighborhood Watch.

Tuesday .May 23.2000 America Online: SJain79800

About the AOL Instant Messenger SM Service

The AOL Instant MessengerSM service is a free service that allows non-AOL members to have private chats in real time with AOL members and other AOL Instant Messenger users who are online at the same time.

Your friends' AOL Instant Messenger names can be added to your Buddy List groups so you'll know when they are online.

Send an invitation to your Internet friends to sign up for AOL's Instant Messenger Service at Keyword: Instant Messenger.

For more information, see:
About the Instant Message feature
About the Buddy List feature
Maintaining your privacy
If you have more questions about this, Ask the Staff.

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PRECEDENTIAL

Filed January 16, 2003

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 01-1120

JOHN GREEN

Appellant

v.

AMERICA ONLINE (AOL); JOHN DOES 1 & 2

On Appeal From the United States District Court
For the District of New Jersey
(D.C. Civ. No. 00-cv-03367)
District Judge: Honorable Joseph A. Greenaway, Jr.

Submitted Under Third Circuit LAR 34.1(a)
November 15, 2002

Before: SLOVITER, RENDELL AND ROSENN,
Circuit Judges

(Filed: January 16, 2003)

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OPINION OF THE COURT

ROSENN, Circuit Judge:

The primary issue raised in this appeal, one of first impression in this court, is whether American Online, Inc. (AOL), a provider of interactive computer services, is statutorily immune from liability from causes of action arising from third party content. The plaintiff, John Green, sued AOL and John Does 1 and 2 in the Superior Court of New Jersey. In his one hundred and ten paragraph pro se amended complaint, aptly described by the District Court as "not especially clear," the plaintiff alleges that AOL negligently failed to live up to its contractual obligations to Green by refusing to take necessary action against John Does 1 and 2, who allegedly transmitted harmful online messages to Green and others.

Green named AOL as an additional defendant, claiming that the messages were transmitted during the course of conversations carried on through the AOL international work service. Because Green amended his complaint in the state court, adding a claim that AOL violated his First Amendment rights, AOL removed the case to the District Court for the District of New Jersey. The District Court denied Green's motion to remand to the state court. AOL moved to dismiss all claims against it on the ground that it was statutorily immune from all tort claims against it relating to the John Doe defendants' messages by virtue of the provisions of 47 U.S.C. S 230.

The District Court granted AOL's motion.[1]

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[1]. The District Court entered an order remanding the pendant state claims to the New Jersey State Court, an exercise of its discretionary authority to decline to retain supplemental jurisdiction over the non- dismissed counts and to remand them under 28 U.S.C.S 1367(c)(3). This appeal, therefore, is from a final order of the District Court.

Green timely appealed from the order denying his motion to remand to the state court and from the order dismissing his claims against AOL. We affirm.

I.

Undisputed by the parties, AOL is the world's largest interactive computer service with over 2.2 million members. It provides its millions of subscribers information that is only available though its international network of interconnected computers and services, and access to the public Internet. (117-18A). It also provides or enables, inter alia, a number of online communications tools, such as e-mail, news groups, and chat rooms, that allow its subscribers to communicate with one another and with other users of the Internet. (Id.)

A subscriber to AOL must agree to the terms of its Member Agreement, which requires subscribers to adhere to AOL's standards for online speech and conduct set forth in AOL's "Community Guidelines." Green subscribed to AOL using the screen name "Lawyerkill." A screen name is commonly used by persons when communicating through an online service such as AOL. The other two defendants, John Doe 1 and John Doe 2, allegedly were also AOL subscribers adopting the screen names LegendaryPOLCIA" and "Lawyerkiii," respectively. (116A) "Lawyerkiii" appears as "Lawyerkill" when the letter "i" is capitalized.

Green's amended complaint alleges that the John Doe defendants transmitted certain content in the AOL chat room "Romance - New Jersey over 30." Chat rooms are a modern-day analog to yesteryear's telephone party lines and allow individual parties to "talk" to as many as twenty-three other parties at one time. The first chat room incident of which Green complains involved John Doe 1, who

allegedly entered the chat room conversation under the screen name "LegendaryPOLCIA." (121A) Green alleges that John Doe 1 "sent a punter through AOL, which caused Green's computer to lock up and Green had to restart his computer." Green's complaint describes a "punter" as a computer program created by a hacker whose purpose is to halt and disrupt another computer. Upon restarting his computer and entering the chat room where the punter had been delivered, Green learned that "LegendaryPOLCIA" claimed credit for producing what he called the"blue screen of death." Green alleges that he lost five hours of work restarting his computer, causing him damages of approximately $400.

Green also alleges that he and unidentified others reported John Doe 1 to AOL who informed him that they would take no action unless he provided evidence that "LegendaryPOLCIA" sent the destructive signal. Green alleges that he provided additional evidence to AOL but it took "no effective action to stop `LegendaryPOLCIA.' " The amended complaint alleges other online episodes in which "LegendaryPOLCIA" (John Doe 1) and "Lawyerkiii" (John Doe 2) allegedly defamed and inflicted emotional distress on Green. First, the complaint alleges that "LegendaryPOLCIA" defamed Green by typing the messages "SHELLS CAREFUL LAWYER IS BI" and "LAWYER NO IMS FOR GAY SEX THX:))" in a chat room titled "Romance - New Jersey over 30." Green alleges that he faxed AOL a log of the chat room showing "LegendaryPOLCIA" defaming him but AOL did nothing to stop it. The complaint also alleges that on two occasions "LawyerKiii" impersonated Green entering a chat room and "asking guys in the chat room for gay sex." The complaint also purported to plead a general negligence claim against AOL for failure to police its services.

There were also allegations that AOL's Community Guidelines violated Green's First Amendment rights because they required Green to adhere to them when he used AOL service to access the Internet. Green further alleged that AOL violated the New Jersey Consumer Fraud Act by filing legal actions against third parties for sending unlawful bulk, unsolicited e-mail (commonly known as "Spam") to AOL subscribers and by blocking access to unspecified "internet newsgroups."

The complaint demanded a total of $400 in compensatory damages from AOL and the two John Doe plaintiffs and unspecified punitive damages. It also sought injunctive relief to enjoin AOL from restricting Green's ability to send and obtain information on the Internet when using AOL's services.

The District Court had jurisdiction pursuant to 28 U.S.C. S 1331. We exercise plenary review over the District Court's order denying Green's motion for remand. Werwinski v. Ford Motor Co., 286 F.3d 661, 665 (3d Cir. 2002).[2] Our review of a decision to grant a Rule 12(b)(6) motion is plenary. Weston v. Pennsylvania, 251 F.3d 420, 425 (3d Cir. 2001). We accept all factual allegations in the complaint as true, and we draw all reasonable inferences in the light most favorable to the plaintiff. Id. We will affirm only if no relief could be granted under any set of facts the

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[2] A remand to a state court expressly pursuant to 28 U.S.C. S 1447(c), which allows a District Court to decline to exercise supplemental jurisdiction over claims when it appears that it lacks subject matter jurisdiction, is unreviewable on appeal under 28 U.S.C. S 1447(d). However, in this case the District Court did not expressly remand pursuant to S 1447 (c); remand appears to have been discretionary and thus reviewable under 28 U.S.C. S 1367(c)(3). See In re U.S. Healthcare, Inc., 193 F.3d 151, 159 (3d Cir. 1999).

plaintiff could prove. Id.

We agree with the District Court's reasoning and conclusion with respect to Green's motion to remand the case to state court. Green alleged in Count Twelve of his Amended Complaint that AOL's Community Guidelines abrogate his freedom of speech and violate his First Amendment rights. This is a clear invocation of federal question jurisdiction under 28 U.S.C. S 1331. Removal thus was proper under 28 U.S.C. S 1441. Joyce v. RJR Nabisco Holdings Corp., 126 F.3d 166, 171 (3d Cir. 1997). Green argues that the removal was defective because the John Doe defendants did not join the notice of removal. However, the general rule that all defendants must join in a notice of removal may be disregarded where, as here, the non-joining defendants are unknown. Balazik v. County of Dauphin, 44 F.3d 209, 213 n.4 (3d Cir. 1995).

We also agree that Green's tort claims are subject to AOL's immunity under 47 U.S.C. S 230. Section 230 provides, in pertinent part, "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. S 230(c)(1). Section 230 also provides that"[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." 47 U.S.C. S 230(e)(3). There is no dispute that AOL is an interactive computer service as defined in 47 U.S.C. S 230(f) or that the relevant content originated not from AOL but from "another information content provider." 47 U.S.C. S 230(c)(1). The only question, then, is whether holding AOL liable for its alleged negligent failure to properly police its network for content transmitted by its users -- here, the "punter" signal and the derogatory comments -- would "treat" AOL "as the publisher or

speaker" of that content. We agree with the District Court that it would.

By its terms, S 230 provides immunity to AOL as a publisher or speaker of information originating from another information content provider. The provision "precludes courts from entertaining claims that would place a computer service provider in a publisher's role," and therefore bars "lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions -- such as deciding whether to publish, withdraw, postpone, or alter content." Zeran v. America Online, Inc., 129 F.3d 327, 330 (4th Cir. 1997); see also, e.g., Ben Ezra, Weinstein & Co. v. America Online, Inc., 206 F.3d 980, 986 (10th Cir. 2000) ("Congress clearly enacted S 230 to forbid the imposition of publisher liability on a service provider for the exercise of its editorial and self-regulatory functions.").

There is no real dispute that Green's fundamental tort claim is that AOL was negligent in promulgating harmful content and in failing to address certain harmful content on its network. Green thus attempts to hold AOL liable for decisions relating to the monitoring, screening, and deletion of content from its network -- actions quintessentially related to a publisher's role. Section 230 "specifically proscribes liability" in such circumstances. Zeran, 129 F.3d at 332-33.

Green disputes that the "punter" computer program sent to him by "LegendaryPOLCIA" constitutes "information" within the meaning of the statute.[3] He argues that the

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3. Green does not dispute that the John Doe defendants are "information content providers," or that the messages they transmitted in the chat rooms constitute "information," within the meaning of the statute.

statute's use of the term "information" is restricted to "communication or reception of knowledge or intelligence, and not an unseen signal that halts someone's computer," and that Congress would have defined the term more technically if it had intended anything beyond the word's most common meaning. We disagree; the District Court correctly interpreted the word "information." Noting that the dictionary includes "signal" as a definition of "information," the District Court concluded that the narrow interpretation offered by Green to hold AOL liable for Green's reception of the punter signal or program would run afoul of the intention of section 230. See United States v. Loney, 219 F.3d 281, 285 (3d Cir. 2000) (in construing a statutory term, the bare meaning of the word is considered with its placement and purpose in the statutory scheme). We agree with the District Court that section 230 immunizes AOL in this circumstance.

Green appears to argue that AOL waived its immunity under section 230 by the terms of its membership contract with him and because AOL's Community Guidelines outline standards for online speech and conduct and contain promises that AOL would protect Green from other subscribers. However, as the District Court determined, the Member Agreement between the parties tracks the provisions of section 230 and provides that AOL"does not assume any responsibility" for content provided by third parties. Though AOL reserved the right to remove messages deemed not in compliance with the Community Guidelines, it expressly disclaimed liability for failure or delay in removing such messages. The District Court, therefore, rejected Green's waiver and estoppel arguments. Instead, it concluded that AOL made no false representation and actually complied with the Member Agreement.

Green also appears to argue that the first five pages of the Member Agreement (where the disclaimers of liability are found) are void for lack of consideration. However, Green concedes that having read the agreement, he decided to become a member of AOL and continue to use its service beyond a free-trial period. The consideration Green received was his membership and use of AOL's services.

Green next contends that section 230 contravenes the First Amendment because it "allows a provider to restrict any material including constitutionally protected material." Section 230(c)(2) immunizes from liability providers and users of interactive computer service who voluntarily make good faith efforts to restrict access to material they consider to be objectionable, for example, "obscene,""excessively violent," or "harassing." Green's contention lacks merit. Section 230(c)(2) does not require AOL to restrict speech; rather it allows AOL to establish standards of decency without risking liability for doing so.[4] Accordingly, the District Court properly dismissed Green's tort claims as barred by S 230.

We also agree with the District Court's conclusion that Green failed to state a claim for breach of contract, because "[T]he plain language of the Member Agreement forecloses any claims that AOL breached its obligations." Green

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4. Green also argues that section 230(c)(2) runs afoul of the Commerce Clause by allowing AOL to control interstate commerce. It does not appear that Green raised this argument to the District Court, and we need not consider it for the first time on appeal. Ross v. Hotel Employees & Rest. Employees Int'l Union, 266 F.3d 236, 242 (3d Cir. 2001). We note, however, that in passing the legislation that became section 230, Congress properly exercised its power to regulate interstate commerce. See Zeran, 129 F.3d at 334.

contends that AOL breached the terms of the Community Guidelines when it failed to take action against John Does 1 and 2. However, by their terms, the Member Agreement and Community Guidelines were not intended to confer anyrights on Green and AOL did not promise to protect Green from the acts of other subscribers. Concerning Green's claim that AOL breached the implied covenant of good faith and fair dealing, i.e., that AOL failed to act in good faith to perform the terms of their contract (meaning the Community Guidelines), we add that this claim fails in light of the explicit agreement of the parties as stated above.

Furthermore, Green's claims that AOL's Community Guidelines violated his First Amendment right to free speech are meritless. AOL is a private, for profit company and is not subject to constitutional free speech guarantees. It is a fee-based Internet service provider that runs a proprietary, content-based online service. We are unpersuaded by Green's contentions that AOL is transformed into a state actor because AOL provides a connection to the Internet on which government and taxpayer-funded websites are found, and because AOL opens its network to the public whenever an AOL member accesses the Internet and receives email or other messages from non-members of AOL. See Lloyd Corp. v. Tanner, 407 U.S. 551, 569 (1972) (private property does not lose its private character merely because the public is generally invited to use it for designated purposes). Green's argument under the New Jersey constitution fails as well because AOL's service is not sufficiently "devoted to public use" under the factors of New Jersey v. Schmid, 423 A.2d 615 (N.J. 1980).

Lastly, Green contends that the District Court erred in holding that AOL did not violate the New Jersey Consumer Fraud Act (NJCFA), N.J. Stat. Ann. SS 56:8-1, et seq. In the

District Court, Green contended, as he seems to argue on appeal, that AOL committed consumer fraud because after promising its users unlimited Internet access and e-mail, it sued outside companies to prevent them from sending objectionable or unlawful e-mail. The NJCFA, 56:8-2, provides that deception, fraud, or any unconscionable commercial practice are among the practices declared to be unlawful. "Unconscionable" implies conduct that lacks "good faith, honesty in fact, and observance of fair dealing." Gennari v. Weichert Co. Realtors, 288 N.J. Super. 504, 533 (App. Div. 1996). The District Court held that AOL did not act unconscionably and that its Member Agreement was not dishonest or entered into in bad faith. It found that AOL exercised its rights on several occasions under the Member Agreement to prevent unsolicited bulk e-mail from entering or utilizing the network "to protect its members from materials it considered objectionable to its subscribers -- hardly unconscionable actions." In addition, the District Court concluded that S 230(c)(2) provided AOL with immunity for this alleged activity because it protects an interactive computer service from liability for"any action voluntarily taken in good faith to restrict access or availability of material that the provider or user considers to be . . . objectionable." We see no error in the District Court's finding or its disposition of Green's claim under the NJCFA.

II.

Accordingly, the District Court's orders denying Green's motion to remand, and dismissing all counts of the complaint against AOL will be affirmed.

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for the Third Circuit